THE

RESOLUTIONS

OF

VIRGINIA AND KENTUCKY;

PENNED BY

MADISON AND JEFFERSON,

IN RELATION TO THE

ALIEN AND SEDITION LAWS.

Ultaeæ scripta est.

RICHMOND:
Printed by Shepherd & Pollard.
1826.

PREFACE.

The administration of Mr. John Adams was a dark day for the Republic. Then, Alien and Sedition acts were let loose upon us: the purity of the Constitution itself was violated by the madness of party: and those Rights which had been respectively reserved to the *States* and to the *People*, were exposed to the most fearful jeopardy by the usurpations of the Federal Government.

But, the friends of the Constitution did not "despair of the Republic." Though the liberty of Speech and of the Press were invaded; though the power and patronage of the Government were exerted to intimidate or seduce the people; the Republicans did not abandon the cause of their Country. Their resistance continued with the crisis: the form of it only was varied. While Mr. Jefferson remained in the Senate of the United States, and Mr. Gallatin in the House of Representatives, most of their most able and active friends, in some of the States, retired from the walks of the General Government, and retreated to the State Legislatures; in which great citadels of the public Liberty, they proposed to re-assert the true principles of the Government. The Republicans succeeded; and the Constitution was saved.

Among the most memorable productions of those times, were the Resolutions and Reports, which were adopted by the Legislatures of Kentucky and Virginia. These were penned by Jefferson and Madison. To Mr. Madison is due, the honor of having drafted the Virginia Resolutions of the 21st December, 1798; and that masterly Vindication of them, which was adopted by the Legislature of Virginia during the session of '99–1800: a paper, which is familiarly known by the name of "*Madison's Report*," and which deserves to last as long as the Constitution itself.

The Resolutions of Kentucky, were submitted to the Legislature of that State, by Mr. John Breckenridge, and adopted by them on the 10th November, 1798. They had the honor of being penned by the Author of the Declaration of American Independence.

Both these esteemed Productions are scarce, and out of print. They are frequently asked for. They are again wanting, to re-establish the land-marks of the Constitution; and to stay that flood of encroachment which threatens to sweep our Country. The Rights of the States and of the People, are again assailed in an alarming manner. Doctrines are preached in high places, which are directly at war with the principles of our Government. The Centripetal power is assuming a new and fearful energy. Under the authority of great names, great errors are maintained. Is it not time, then, for the friends of Truth to rally together, and to re-assert her principles? Where can we find these principles more clearly stated, or the arguments in their defence more powerfully developed, than in the celebrated Productions which the Publisher of this Pamphlet now lays before his readers?

Richmond, (*Va.*) *February*, 1826.

210914

IN THE HOUSE OF DELEGATES.

MONDAY, JANUARY 20, 1800.

Resolved, That five thousand copies of the Report of the Select Committee, to whom were referred the answers of several States upon the Resolutions of the last Legislature, the said answers, [and also, the instructions to the Senators of this State, in the Congress of the United States, together with the names of those who voted on each of those subjects,] be printed without delay; and that the Executive be requested, as soon as may be, to distribute them equally, in such manner as they shall think best, among the good people of this Commonwealth.

Attest,

WILLIAM WIRT, *C. H. D.*

H. BROOKE, *C. S.*

[☞ *The part contained in brackets, is not embraced in the present publication.*]

COMMUNICATIONS, &c.

STATE OF DELAWARE.

IN THE HOUSE OF REPRESENTATIVES,

February 1, 1799.

Resolved, By the Senate and House of Representatives of the State of Delaware, in General Assembly met, that they consider the resolutions from the State of Virginia, as a very unjustifiable interference with the General Government and Constituted Authorities of the United States, and of dangerous tendency, and therefore not a fit subject for the further consideration of the General Assembly.

ISAAC DAVIS, *Speaker of Senate.*

STEPHEN LEWIS, *Speaker of the House of Representatives.*

Test,

John Fisher, c. s.
John Caldwell, c. h. r.

Resolved, That the above resolution be signed by the Speaker of Senate, and by the Speaker of the House of Representatives; and that the Governor of this State be requested to forward the same to the Governor of the State of Virginia.

JOHN FISHER, C. S.
JOHN CALDWELL, C. H. R.

STATE OF RHODE ISLAND

AND

PROVIDENCE PLANTATIONS.

In General Assembly, Feb. A. D. 1799.

CERTAIN resolutions of the Legislature of Virginia, passed on the twenty-first day of December last, being communicated to this Assembly,

1. *Resolved,* That in the opinion of this Legislature, the second section of the third article of the Constitution of the United States, in these words, to wit: *The Judicial power shall extend to all cases, arising under the laws of the United States,* vests in the Federal Courts, exclusively, and in the Supreme Court of the United States, ultimately, the authority of deciding on the Constitutionality of any act or law of the Congress of the United States.

2. *Resolved,* That for any State Legislature to assume that authority, would be,

1st. Blending together Legislative and Judicial powers.

2d. Hazarding an interruption of the peace of the States by civil discord, in case of a diversity of opinions among the State Legislatures; each State having, in that case, no resort for vindicating its own opinion, but to the strength of its own arm.

3d. Submitting most important questions of law, to less competent tribunals: and

4th. An infraction of the Constitution of the United States, expressed in plain terms.

3. *Resolved,* That although for the above reasons, this Legislature, in their public capacity, do not feel themselves authorised to consider and decide on the Constitutionality of the Sedition and Alien Laws (so called:) Yet they are called upon by the exigency of this occasion, to declare, that in their private opinions, these laws are within the powers delegated to Congress, and promotive of the welfare of the United States.

4. *Resolved,* That the Governor communicate these resolutions to the Supreme Executive of the State of Virginia, and at the same time, express to him, that this Legislature cannot contemplate, without extreme concern and regret, the many evil

and fatal consequences which may flow from the very unwarrantable resolutions aforesaid, of the Legislature of Virginia, passed on the twenty-first day of December last.

A true copy,

SAMUEL EDDY, Sec'y.

COMMONWEALTH OF MASSACHUSETTS.

IN SENATE, February 9, 1799.

The Legislature of Massachusetts having taken into serious consideration the resolutions of the State of Virginia, passed the 21st day of December last, and communicated by his excellency the Governor, relative to certain supposed infractions of the Constitution of the United States, by the Government thereof, and being convinced that the Federal Constitution is calculated to promote the happiness, prosperity and safety of the people of these United States, and to maintain that union of the several States, so essential to the welfare of the whole; and, being bound by solemn oath to support and defend that Constitution, feel it unnecessary to make any professions of their attachment to it, or of their firm determination to support it against every aggression, foreign or domestic.

But they deem it their duty solemnly to declare, that while they hold sacred the principle, that the consent of the people is the only pure source of just and legitimate power, they cannot admit the right of the State Legislatures to denounce the administration of that Government to which the people themselves, by a solemn compact, have exclusively committed their national concerns: That, although a liberal and enlightened vigilance among the people is always to be cherished, yet an unreasonable jealousy of the men of their choice, and a recurrence to measures of extremity, upon groundless or trivial pretexts, have a strong tendency to destroy all rational liberty at home, and to deprive the United States of the most essential advantages in their relations abroad: That this Legislature are persuaded, that the decision of all cases in law and equity, arising under the Constitution of the United States, and the construction of all laws made in pursuance thereof, are exclusively vested by the people in the Judicial Courts of the United States.

That the people in that solemn compact, which is declared to be the supreme law of the land, have not constituted the State Legislatures the judges of the acts or measures of the Federal Government, but have confided to them the power of proposing such amendments of the Constitution, as shall appear to

them necessary to the interests, or conformable to the wishes of the people whom they represent.

That by this construction of the Constitution, an amicable and dispassionate remedy is pointed out for any evil which experience may prove to exist, and the peace and prosperity of the United States may be preserved without interruption.

But, should the respectable State of Virginia persist in the assumption of the right to declare the acts of the national government unconstitutional, and should she oppose successfully her force and will to those of the nation, the Constitution would be reduced to a mere cypher, to the form and pageantry of authority, without the energy of power. Every act of the Federal Government which thwarted the views or checked the ambitious projects of a particular State, or of its leading and influential members, would be the object of opposition and of remonstrance; while the people, convulsed and confused by the conflict between two hostile jurisdictions, enjoying the protection of neither, would be wearied into a submission to some bold leader, who would establish himself on the ruins of both.

The Legislature of Massachusetts, although they do not themselves claim the right, nor admit the authority, of any of the State Governments, to decide upon the Constitutionality of the acts of the Federal Government, still, least their silence should be construed into disapprobation, or at best into a doubt of the Constitutionality of the acts referred to by the State of Virginia; and, as the General Assembly of Virginia has called for an expression of their sentiments, do explicitly declare, that they consider the acts of Congress, commonly called "the Alien and Sedition Acts," not only Constitutional, but expedient and necessary: That the former act respects a description of persons whose rights were not particularly contemplated in the Constitution of the United States, who are entitled only to a temporary protection, while they yield a temporary allegiance; a protection, which ought to be withdrawn whenever they become "dangerous to the public safety," or are found guilty of "treasonable machinations" against the Government: That Congress having been especially entrusted by the people with the general defence of the nation, had not only the right, but were bound to protect it against internal as well as external foes.

That the United States, at the time of passing the *Act concerning Aliens*, were threatened with actual invasion, had been driven by the unjust and ambitious conduct of the French Government into warlike preparations, expensive and burthensome, and had then, within the bosom of the country, thousands of Aliens, who, we doubt not, were ready to co-operate in any external attack.

It cannot be seriously believed, that the United States should have waited till the poignard had in fact been plunged. The removal of aliens is the usual preliminary of hostility, and is justified by the invariable usages of nations. Actual hostility had unhappily long been experienced, and a formal declaration of it the government had reason daily to expect. The law, therefore, was just and salutary, and no officer could with so much propriety be entrusted with the execution of it, as the one in whom the Constitution has reposed the Executive power of the United States.

The Sedition Act, so called, is, in the opinion of this Legislature, equally defensible. The General Assembly of Virginia, in their resolve under consideration, observe, that when that State by its Convention, ratified the Federal Constitution, it expressly declared, "That, among other essential rights, the liberty of conscience and of the press cannot be cancelled, abridged, restrained or modified by any authority of the United States," and from its extreme anxiety to guard these rights from every possible attack of sophistry or ambition, with other States, recommended an amendment for that purpose; which amendment was, in due time, annexed to the Constitution; but they did not surely expect that the proceedings of their State Convention were to explain the amendment adopted by the Union. The words of that amendment, on this subject, are, "Congress shall make no law abridging the freedom of speech or of the press."

The act complained of is no abridgment of the freedom of either. The genuine liberty of speech and the press, is the liberty to utter and publish the truth; but the constitutional right of the citizen to utter and publish the truth, is not to be confounded with the licentiousness in speaking and writing, that is only employed in propagating falsehood and slander. This freedom of the press has been explicitly secured by most, if not all the State Constitutions; and of this provision there has been generally but one construction among enlightened men; that it is a security for the rational use and not the abuse of the press; of which the courts of law, the juries and people will judge: this right is not infringed, but confirmed and established by the late act of Congress.

By the Constitution, the Legislative, Executive and Judicial departments of Government are ordained and established; and general enumerated powers vested in them respectively, including those which are prohibited to the several States. Certain powers are granted in general terms by the people to their General Government, for the purposes of their safety and protection. That Government is not only empowered, but it is

made their duty, to repel invasions and suppress insurrections; to guarantee to the several States a republican form of government; to protect each State against invasion, and, when applied to, against domestic violence; to hear and decide all cases in law and equity, arising under the Constitution, and under any treaty or law made in pursuance thereof; and all cases of admiralty and maritime jurisdiction, and relating to the law of nations. Whenever, therefore, it becomes necessary to effect any of the objects designated, it is perfectly consonant to all just rules of construction, to infer, that the usual means and powers necessary to the attainment of that object, are also granted: But the Constitution has left no occasion to resort to implication for these powers; it has made an express grant of them, in the eighth section of the first article, which ordains, "That Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof."

This Constitution has established a Supreme Court of the United States, but has made no provision for its protection, even against such improper conduct in its presence, as might disturb its proceedings, unless expressed in the section before recited. But as no statute has been passed on this subject, this protection is, and has been for nine years past, uniformly found in the application of the principles and usages of the common law. The same protection may unquestionably be afforded by a statute passed in virtue of the before-mentioned section, as necessary and proper, for carrying into execution the powers vested in that department. A construction of the different parts of the Constitution, perfectly just and fair, will, on analagous principles, extend protection and security against the offences in question, to the other departments of Government, in discharge of their respective trusts.

The President of the United States is bound by his oath, "to preserve, protect and defend the Constitution," and it is expressly made his duty "to take care that the laws be faithfully executed;" but this would be impracticable by any created being, if there could be no legal restraint of those scandalous misrepresentations of his measures and motives, which directly tend to rob him of the public confidence. And equally impotent would be every other public officer, if thus left to the mercy of the seditious.

It is holden to be a truth most clear, that the important trusts before enumerated, cannot be discharged by the Government to which they are committed, without the power to re-

strain or punish seditious practices and unlawful combinations against itself, and to protect the officers thereof from abusive misrepresentations. Had the Constitution withheld this power, it would have made the Government responsible for the effects, without any control over the causes which naturally produce them, and would have essentially failed of answering the great ends for which the people of the United States declare, in the first clause of that instrument, that they establish the same, viz: "To form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and posterity."

Seditious practices and unlawful combinations against the Federal Government, or any officer thereof, in the performance of his duty, as well as licentiousness of speech and of the press, were punishable on the principles of common law in the courts of the United States, before the act in question was passed. This act then is an amelioration of that law in favour of the party accused, as it mitigates the punishment which that authorises, and admits of any investigation of public men and measures which is regulated by truth. It is not intended to protect men in office, only as they are agents of the people. Its object is to afford legal security to public offices and trusts created for the safety and happiness of the people, and therefore the security derived from it is for the benefit of the people and is their right.

This construction of the Constitution and of the existing law of the land, as well as the act complained of, the Legislature of Massachusetts most deliberately and firmly believe results from a just and full view of the several parts of that Constitution; and they consider that act to be wise and necessary, as an audacious and unprincipled spirit of falsehood and abuse had been too long unremittingly exerted for the purpose of perverting public opinion, and threatened to undermine and destroy the whole fabric of the Government.

The Legislature further declare, that in the foregoing sentiments they have expressed the general opinion of their constituents, who have not only acquiesced without complaint in those particular measures of the Federal Government, but have given their explicit approbation by re-electing those men who voted for the adoption of them: Nor is it apprehended, that the citizens of this State will be accused of supineness or of an indifference to their constitutional rights; for, while on the one hand, they regard with due vigilance the conduct of the Government; on the other, their freedom, safety and happiness require, that they should defend that Government and its Con-

stitutional measures against the open or insidious attacks of any foe, whether foreign or domestic.

And lastly, that the Legislature of Massachusetts feel a strong conviction, that the several United States are connected by a common interest, which ought to render their union indissoluble, and that this State will always co-operate with its confederate States, in rendering that union productive of mutual security, freedom and happiness.

Sent down for concurrence.

SAMUEL PHILIPS, *President.*

In the House of Representatives, Feb. 13, 1799.

Read and concurred.

EDWARD H. ROBBINS, *Speaker.*

A true copy.

Attest, JOHN AVERY, *Secretary.*

STATE OF NEW-YORK.

IN SENATE, March 5, 1799.

WHEREAS the people of the United States have established for themselves, a free and independent National Government; And whereas it is essential to the existence of every Government, that it have authority to defend and preserve its Constitutional powers inviolate, in as much, as every infringement thereof tends to its subversion. And whereas the Judicial power extends expressly to all cases of law and equity arising under the Constitution and the laws of the United States, whereby the interference of the Legislatures of the particular States in those cases is manifestly excluded. And whereas our peace, prosperity and happiness, eminently depend on the preservation of the Union, in order to which, a reasonable confidence in the constituted authorities and chosen representatives of the people is indispensable. And whereas every measure calculated to weaken that confidence, has a tendency to destroy the usefulness of our public functionaries, and to excite jealousies equally hostile to rational liberty, and the principles of a good republican Government. And whereas the Senate not perceiving that the rights of the particular States have been

violated, nor any unconstitutional powers assumed by the General Government, cannot forbear to express the anxiety and regret with which they observe the inflammatory and pernicious sentiments and doctrines which are contained in the resolutions of the Legislatures of Virginia and Kentucky; sentiments and doctrines, no less repugnant to the Constitution of the United States, and the principles of their union, than destructive to the Federal Government, and unjust to those whom the people have elected to administer it: wherefore,

Resolved, That while the Senate feel themselves constrained to bear unequivocal testimony against such sentiments and doctrines, they deem it a duty no less indispensable, explicitly to declare their incompetency, as a branch of the Legislature of this State, to supervise the acts of the General Government.

Resolved, That his Excellency the Governor be, and he is hereby requested to transmit a copy of the foregoing resolution to the Executives of the States of Virginia and Kentucky, to the end, that the same may be communicated to the Legislatures thereof.

A true copy,

ABM. B. BAUCKER, *Clerk.*

STATE OF CONNECTICUT.

At a General Assembly of the State of Connecticut, holden at Hartford, in the said State, on the second Thursday of May, Anno Domini, 1799, his Excellency the Governor having communicated to this Assembly sundry resolutions of the Legislature of Virginia, adopted in December, 1798, which relate to the measures of the General Government, and the said resolutions having been considered, it is

Resolved, That this Assembly views with deep regret, and explicitly disavows, the principles contained in the aforesaid resolutions; and particularly the opposition to the "Alien and Sedition Acts," acts, which the Constitution authorised; which the exigency of the country rendered necessary; which the constituted authorities have enacted, and which merit the entire approbation of this Assembly.—They therefore decidedly refuse to concur with the Legislature of Virginia, in promoting any of the objects attempted in the aforesaid resolutions.

And it is further resolved, that his Excellency the Governor be requested to transmit a copy of the foregoing resolution to the Governor of Virginia, that it may be communicated to the Legislature of that State.

Passed in the House of Representatives unanimously.

Attest, JOHN C. SMITH, *Clerk.*

Concurred unanimously in the Upper House.

Teste, SAMUEL WYLLYS, *Sec'ry.*

STATE OF NEW-HAMPSHIRE.

IN THE HOUSE OF REPRESENTATIVES, JUNE 14, 1799.

THE Committee, to take into consideration the resolutions of the General Assembly of Virginia, dated December 21st, 1798; also certain resolutions of the Legislature of Kentucky, of the 10th November, 1798, report as follows:

The Legislature of New-Hampshire having taken into consideration certain resolutions of the General Assembly of Virginia, dated December 21, 1798; also certain resolutions of the Legislature of Kentucky, of the 10th of November, 1798.

Resolved, That the Legislature of New-Hampshire unequivocally express a firm resolution to maintain and defend the Constitution of the United States, and the Constitution of this State, against every aggression, either foreign or domestic, and that they will support the Government of the United States in all measures warranted by the former.

That the State Legislatures are not the proper tribunals to determine the constitutionality of the laws of the General Government—that the duty of such decision is properly and exclusively confided to the Judicial department.

That if the Legislature of New-Hampshire for mere speculative purposes, were to express an opinion on the acts of the General Government, commonly called "the Alien and Sedition Bills," that opinion would unreservedly be, that those acts are constitutional, and in the present critical situation of our country, highly expedient.

That the constitutionality and expediency of the acts aforesaid, have been very ably advocated and clearly demonstrated by many citizens of the United States, more especially by the minority of the General Assembly of Virginia. The Legisla-

ture of New-Hampshire therefore deem it unnecessary, by any train of arguments, to attempt further illustration of the propositions, the truth of which, it is confidently believed, at this day, is very generally seen and acknowledged.

Which report being read and considered, was unanimously received and accepted, one hundred and thirty-seven members being present.

Sent up for concurrence.

JOHN PRENTICE, *Speaker.*

In Senate, the same day, read and concurred unanimously.

AMOS SHEPARD, *President.*

Approved, June 15th, 1799.

J. T. GILMAN, *Governor.*

A true copy.

Attest, JOSEPH PEARSON, *Secretary.*

STATE OF VERMONT.

IN THE HOUSE OF REPRESENTATIVES,
OCTOBER 30th, A. D. 1799.

THE House proceeded to take under their consideration, the resolutions of the General Assembly of Virginia, relative to certain measures of the General Government, transmitted to the Legislature of this State, for their consideration: Whereupon,

Resolved, That the General Assembly of the State of Vermont do highly disapprove of the resolutions of the General Assembly of Virginia, as being unconstitutional in their nature, and dangerous in their tendency. It belongs not to State Legislatures to decide on the constitutionality of laws made by the General Government; this power being exclusively vested in the Judiciary Courts of the Union: That his Excellency the Governor be requested to transmit a copy of this resolution to the Executive of Virginia, to be communicated to the General Assembly of that State: And that the same be sent to the Governor and Council for their concurrence.

SAMUEL C. CRAFTS, *Clerk.*

In Council, October 30, 1799.

Read and concurred unanimously.

RICHARD WHITNEY, *Secretary.*

VIRGINIA.

HOUSE OF DELEGATES.

REPORT

Of the Committee to whom were referred the Communications of various States, relative to the Resolutions of the last General Assembly of this State, concerning the Alien and Sedition Laws.

WHATEVER room might be found in the proceedings of some of the States, who have disapproved of the resolutions of the General Assembly of this Commonwealth, passed on the 21st day of December, 1798, for painful remarks on the spirit and manner of those proceedings, it appears to the Committee most consistent with the duty as well as dignity of the General Assembly, to hasten an oblivion of every circumstance which might be construed into a diminution of mutual respect, confidence and affection, among the members of the Union.

The Committee have deemed it a more useful task, to revise with a critical eye, the resolutions which have met with this disapprobation; to examine fully the several objections and arguments which have appeared against them; and to enquire whether there be any errors of fact, of principle, or of reasoning, which the candor of the General Assembly ought to acknowledge and correct.

The first of the resolutions is in the words following:

Resolved, That the General Assembly of Virginia doth unequivocally express a firm resolution to maintain and defend the Constitution of the United States, and the Constitution of this State, against every aggression, either foreign or domestic, and that they will support the Government of the United States in all measures warranted by the former.

No unfavorable comment can have been made on the sentiments here expressed. To maintain and defend the Constitution of the United States, and of their own State, against every aggression, both foreign and domestic, and to support the Government of the United States in all measures warranted by their Constitution, are duties which the General Assembly ought always to feel, and to which, on such an occasion, it was evidently proper to express their sincere and firm adherence.

In their next resolution—*The General Assembly most solemnly declares a warm attachment to the Union of the States, to maintain which it pledges all its powers; and that, for this end, it is their duty to watch over and oppose every infraction of those principles, which constitute the only basis of that Union, because a faithful observance of them can alone secure its existence and the public happiness.*

The observation just made is equally applicable to this solemn declaration, of warm attachment to the Union, and this solemn pledge to maintain it; nor can any question arise among enlightened friends of the Union, as to the duty of watching over and opposing every infraction of those principles which constitute its basis, and a faithful observance of which can alone secure its existence, and the public happiness thereon depending.

The third resolution is in the words following:

That this Assembly doth explicitly and peremptorily declare, that it views the powers of the Federal Government, as resulting from the compact, to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact; as no farther valid than they are authorised by the grants enumerated in that compact; and that, in case of a deliberate, palpable and dangerous exercise of other powers, not granted by the said compact, the States who are parties thereto, have the right, and are in duty bound, to interpose, for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.

On this resolution, the Committee have bestowed all the attention which its importance merits: They have scanned it not merely with a strict, but with a severe eye: and they feel confidence in pronouncing, that, in its just and fair construction, it is unexceptionably true in its several positions, as well as Constitutional and conclusive in its inferences.

The resolution declares, *first*, that "it views the powers of the Federal Government, as resulting from the compact to which

the States are parties;" in other words, that the Federal powers are derived from the Constitution, and that the Constitution is a compact to which the States are parties.

Clear as the position must seem, that the Federal powers are derived from the Constitution, and from that alone, the Committee are not unapprised of a late doctrine, which opens another source of Federal powers, not less extensive and important, than it is new and unexpected. The examination of this doctrine will be most conveniently connected with a review of a succeeding resolution. The Committee satisfy themselves here with briefly remarking, that in all the cotemporary discussions and comments which the Constitution underwent, it was constantly justified and recommended, on the ground, that the powers not given to the Government, were withheld from it; and that, if any doubt could have existed on this subject, under the original text of the Constitution, it is removed, as far as words could remove it, by the 12th amendment, now a part of the Constitution, which expressly declares, "that the powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The other position involved in this branch of the resolution, namely, "that the States are parties to the Constitution or compact," is, in the judgment of the Committee, equally free from objection. It is indeed true, that the term "States," is sometimes used in a vague sense, and sometimes in different senses, according to the subject to which it is applied. Thus, it sometimes means the separate sections of territory occupied by the political societies within each; sometimes the particular Governments, established by those societies; sometimes those societies as organized into those particular Governments; and, lastly, it means the people composing those political societies, in their highest sovereign capacity. Although it might be wished that the perfection of language admitted less diversity in the signification of the same words, yet little inconveniency is produced by it, where the true sense can be collected with certainty from the different applications. In the present instance, whatever different constructions of the term "States," in the resolution, may have been entertained, all will at least concur in that last mentioned; because, in that sense, the Constitution was submitted to the "States:" in that sense the "States" ratified it: and, in that sense of the term "States," they are consequently parties to the compact, from which the powers of the Federal Government result.

The next position is, that the General Assembly views the powers of the Federal Government, "as limited by the plain

sense and intention of the instrument constituting that compact," and "as no farther valid than they are authorised by the grants therein enumerated." It does not seem possible, that any just objection can lie against either of these clauses. The first amounts merely to a declaration, that the compact ought to have the interpretation plainly intended by the parties to it; the other to a declaration, that it ought to have the execution and effect intended by them. If the powers granted, be valid, it is solely because they are granted: and, if the granted powers are valid, because granted, all other powers not granted, must not be valid.

The resolution, having taken this view of the Federal compact, proceeds to infer, "that, in case of a deliberate, palpable and dangerous exercise of other powers, not granted by the said compact, the States, who are parties thereto, have the right and are in duty bound to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them."

It appears to your Committee to be a plain principle, founded in common sense, illustrated by common practice, and essential to the nature of compacts; that, where resort can be had to no tribunal, superior to the authority of the parties, the parties themselves must be the rightful judges in the last resort, whether the bargain made has been pursued or violated. The Constitution of the United States was formed by the sanction of the States, given by each in its sovereign capacity. It adds to the stability and dignity, as well as to the authority of the Constitution, that it rests on this legitimate and solid foundation. The States, then, being the parties to the Constitutional compact, and in their sovereign capacity, it follows of necessity, that there can be no tribunal above their authority, to decide in the last resort, whether the compact made by them be violated; and, consequently, that, as the parties to it, they must themselves decide, in the last resort, such questions as may be of sufficient magnitude to require their interposition.

It does not follow, however, that because the States, as sovereign parties to their Constitutional compact, must ultimately decide whether it has been violated, that such a decision ought to be interposed, either in a hasty manner, or on doubtful and inferior occasions. Even in the case of ordinary Conventions between different nations, where, by the strict rule of interpretation, a breach of a part may be deemed a breach of the whole; every part being deemed a condition of every other part, and of the whole, it is always laid down that the breach must be both wilful and material to justify an application of the rule. But in the case of an intimate and Constitu-

tional Union, like that of the United States, it is evident that the interposition of the parties, in their sovereign capacity, can be called for by occasions only, deeply and essentially affecting the vital principles of their political system.

The resolution has accordingly guarded against any misapprehension of its object, by expressly requiring for such an interposition, "the case of a *deliberate, palpable* and *dangerous* breach of the Constitution, by the exercise of *powers not granted* by it." It must be a case, not of a light and transient nature, but of a nature *dangerous* to the great purposes for which the Constitution was established. It must be a case, moreover, not obscure or doubtful in its construction, but plain and *palpable*. Lastly, it must be a case not resulting from a partial consideration, or hasty determination; but a case stampt with a final consideration and *deliberate* adherence. It is not necessary, because the resolution does not require, that the question should be discussed, how far the exercise of any particular power, ungranted by the Constitution, would justify the interposition of the parties to it. As cases might easily be stated, which none would contend ought to fall within that description; cases, on the other hand, might, with equal ease, be stated, so flagrant and so fatal, as to unite every opinion in placing them within the description.

But the resolution has done more than guard against misconstruction, by expressly referring to cases of a *deliberate, palpable* and *dangerous* nature. It specifies the object of the interposition which it contemplates, to be solely that of arresting the progress of the *evil* of usurpation, and of maintaining the authorities, rights and liberties appertaining to the States, as parties to the Constitution.

From this view of the resolution, it would seem inconceivable that it can incur any just disapprobation from those, who laying aside all momentary impressions, and recollecting the genuine source and object of the Federal Constitution, shall candidly and accurately interpret the meaning of the General Assembly. If the deliberate exercise of dangerous powers, palpably withheld by the Constitution, could not justify the parties to it, in interposing even so far as to arrest the progress of the evil, and thereby to preserve the Constitution itself, as well as to provide for the safety of the parties to it; there would be an end to all relief from usurped power, and a direct subversion of the rights specified or recognized under all the State Constitutions, as well as a plain denial of the fundamental principle on which our independence itself was declared.

But it is objected, that the Judicial authority is to be regarded as the sole expositor of the Constitution, in the last resort; and

it may be asked for what reason, the declaration by the General Assembly, supposing it to be theoretically true, could be required at the present day and in so solemn a manner.

On this objection it might be observed, *first:* that there may be instances of usurped power, which the forms of the Constitution would never draw within the control of the Judicial department: *secondly*, that if the decision of the Judiciary be raised above the authority of the sovereign parties to the Constitution, the decisions of the other departments, not carried by the forms of the Constitution before the Judiciary, must be equally authoritative and final with the decisions of that department. But the proper answer to the objection is, that the resolution of the General Assembly relates to those great and extraordinary cases, in which all the forms of the Constitution may prove ineffectual against infractions dangerous to the essential rights of the parties to it. The resolution supposes that dangerous powers, not delegated, may not only be usurped and executed by the other departments, but that the Judicial department also may exercise or sanction dangerous powers beyond the grant of the Constitution; and consequently, that the ultimate right of the parties to the Constitution, to judge whether the compact has been dangerously violated, must extend to violations by one delegated authority, as well as by another; by the Judiciary, as well as by the Executive, or the Legislature.

However true, therefore, it may be that the Judicial department, is, in all questions submitted to it by the forms of the Constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the authorities of the other departments of the Government; not in relation to the rights of the parties to the Constitutional compact, from which the Judicial as well as the other departments hold their delegated trusts. On any other hypothesis, the delegation of Judicial power would annul the authority delegating it; and the concurrence of this department with the others in usurped powers, might subvert for ever, and beyond the possible reach of any rightful remedy, the very Constitution, which all were instituted to preserve.

The truth declared in the resolution being established, the expediency of making the declaration at the present day, may safely be left to the temperate consideration and candid judgment of the American public. It will be remembered, that a frequent recurrence to fundamental principles, is solemnly enjoined by most of the State Constitutions, and particularly by our own, as a necessary safeguard against the danger of degeneracy to which republics are liable, as well as other Govern-

ments, though in a less degree than others. And a fair comparison of the political doctrines not unfrequent at the present day, with those which characterized the epoch of our revolution, and which form the basis of our republican Constitutions, will best determine whether the declaratory recurrence here made to those principles, ought to be viewed as unseasonable and improper, or as a vigilant discharge of an important duty. The authority of Constitutions over Governments, and of the sovereignty of the people over Constitutions, are truths which are at all times necessary to be kept in mind; and at no time perhaps more necessary than at the present.

The *fourth* resolution stands as follows:

That the General Assembly doth also express its deep regret, that a spirit has in sundry instances, been manifested by the Federal Government, to enlarge its powers by forced constructions of the Constitutional charter which defines them; and that indications have appeared of a design to expound certain general phrases, (which, having been copied from the very limited grant of powers in the former articles of confederation, were the less liable to be misconstrued) so as to destroy the meaning and effect of the particular enumeration which necessarily explains, and limits the general phrases; and so as to consolidate the States by degrees, into one sovereignty, the obvious tendency and inevitable result of which would be, to transform the present republican system of the United States, into an absolute, or at best a mixed monarchy.

The *first* question here to be considered is, whether a spirit has in sundry instances been manifested by the Federal Government to enlarge its powers by forced constructions of the Constitutional charter.

The General Assembly having declared their opinion merely by regretting in general terms that forced constructions for enlarging the Federal powers have taken place, it does not appear to the Committee necessary to go into a specification of every instance to which the resolution may allude. The Alien and Sedition Acts being particularly named in a succeeding resolution, are of course to be understood as included in the allusion. Omitting others which have less occupied public attention, or been less extensively regarded as unconstitutional, the resolution may be presumed to refer particularly to the Bank law, which from the circumstances of its passage, as well as the latitude of construction on which it is founded, strikes the attention with singular force; and the carriage tax, distinguished also by circumstances in its history having a similar tendency. Those instances alone, if resulting from

forced construction and calculated to enlarge the powers of the Federal Government, as the Committee cannot but conceive to be the case, sufficiently warrant this part of the resolution. The Committee have not thought it incumbent on them to extend their attention to laws which have been objected to, rather as varying the Constitutional distribution of powers in the Federal Government, than as an absolute enlargement of them; because instances of this sort, however important in their principles and tendencies, do not appear to fall strictly within the text under review.

The other questions presenting themselves, are—1. Whether indications have appeared of a design to expound certain general phrases copied from the "Articles of Confederation" so as to destroy the effect of the particular enumeration explaining and limiting their meaning. 2. Whether this exposition would by degrees consolidate the States into one sovereignty. 3. Whether the tendency and result of this consolidation would be to transform the republican system of the United States into a monarchy.

1. The general phrases here meant must be those "of providing for the common defence and general welfare."

In the "Articles of Confederation," the phrases are used as follows, in art. VIII. "All charges of war, and all other expenses that shall be incurred *for the common defence and general welfare*, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to, or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated, according to such mode as the United States in Congress assembled, shall from time to time direct and appoint."

In the existing Constitution, they make the following part of Sec. 8. "The Congress shall have power, to lay and collect taxes, duties, imposts and excises to pay the debts, and provide for the common defence and general welfare of the United States."

This similarity in the use of these phrases in the two great Federal charters, might well be considered, as rendering their meaning less liable to be misconstrued in the latter; because it will scarcely be said, that in the former they were ever understood to be either a general grant of power, or to authorise the requisition or application of money by the old Congress to the common defence and general welfare, except in the cases afterwards enumerated, which explained and limited their meaning; and if such was the limited meaning attached

to these phrases in the very instrument revised and re-modelled by the present Constitution, it can never be supposed that when copied into this Constitution, a different meaning ought to be attached to them.

That, notwithstanding this remarkable security against misconstruction, a design has been indicated to expound these phrases in the Constitution, so as to destroy the effect of the particular enumeration of powers by which it explains and limits them, must have fallen under the observation of those who have attended to the course of public transactions. Not to multiply proofs on this subject, it will suffice to refer to the Debates of the Federal Legislature, in which arguments have on different occasions been drawn, with apparent effect, from these phrases, in their indefinite meaning.

To these indications might be added, without looking farther, the official report on manufactures, by the late Secretary of the Treasury, made on the 5th of December, 1791; and the report of a committee of Congress, in January, 1797, on the promotion of Agriculture. In the first of these it is expressly contended to belong "to the discretion of the National Legislature to pronounce upon the objects which concern the *general welfare*, and for which, under that description, an appropriation of money is requisite and proper. And there seems to be no room for a doubt, that whatever concerns the general interests of LEARNING, of AGRICULTURE, of MANUFACTURES, and of COMMERCE, are within the sphere of the National Councils, *as far as regards an application of money*." The latter report assumes the same latitude of power in the National Councils, and applies it to the encouragement of Agriculture, by means of a society to be established at the seat of government. Although neither of these reports may have received the sanction of a law carrying it into effect; yet, on the other hand, the extraordinary doctrine contained in both, has passed without the slightest positive mark of disapprobation from the authority to which it was addressed.

Now, whether the phrases in question be construed to authorise every measure relating to the common defence and general welfare, as contended by some; or every measure only in which there might be an application of money, as suggested by the caution of others; the effect must substantially be the same, in destroying the import and force of the particular enumeration of powers which follow these general phrases in the Constitution. For, it is evident, that there is not a single power whatever, which may not have some reference to the common defence, or the general welfare; nor a power of any magnitude, which, in its exercise, does not involve or admit an application

of money. The Government, therefore, which possesses power in either one or other of these extents, is a Government without the limitations formed by a particular enumeration of powers; and consequently, the meaning and effect of this particular enumeration, is destroyed by the exposition given to these general phrases.

This conclusion will not be affected by an attempt to qualify the power over the "general welfare," by referring it to cases where the *general welfare* is beyond the reach of *separate* provisions by the *individual States;* and leaving to these their jurisdictions in cases, to which their separate provisions may be competent. For, as the authority of the individual States must in all cases be incompetent to general regulations operating through the whole, the authority of the United States would be extended to every object relating to the general welfare, which might, by any possibility, be provided for by the general authority. This qualifying construction, therefore, would have little, if any tendency, to circumscribe the power claimed under the latitude of the terms "general welfare."

The true and fair construction of this expression, both in the original and existing Federal compacts, appears to the committee too obvious to be mistaken. In both, the Congress is authorised to provide money for the common defence and *general welfare.* In both, is subjoined to this authority, an enumeration of the cases, to which their powers shall extend. Money cannot be applied to the *general welfare,* otherwise than by an application of it to some *particular* measure, conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises, whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it, may be applied to it; if it be not, no such application can be made. This fair and obvious interpretation coincides with, and is enforced by, the clause in the Constitution, which declares, that "no money shall be drawn from the Treasury, but in consequence of appropriations by law." An appropriation of money to the general welfare, would be deemed rather a mockery than an observance of this Constitutional injunction.

2. Whether the exposition of the general phrases here combatted, would not, by degrees, consolidate the States into one sovereignty, is a question, concerning which the committee can perceive little room for difference of opinion. To consolidate the States into one sovereignty, nothing more can be wanted, than to supersede their respective sovereignties in the cases reserved to them, by extending the sovereignty of the United

States, to all cases of the "general welfare," that is to say, to *all cases whatever.*

3. That the obvious tendency and inevitable result of a consolidation of the States into one sovereignty, would be to transform the republican system of the United States into a monarchy, is a point which seems to have been sufficiently decided by the general sentiment of America. In almost every instance of discussion, relating to the consolidation in question, its certain tendency to pave the way to monarchy, seems not to have been contested. The prospect of such a consolidation, has formed the only topic of controversy. It would be unnecessary, therefore, for the committee to dwell long on the reasons which support the position of the General Assembly. It may not be improper, however, to remark two consequences, evidently flowing from an extension of the Federal powers to every subject falling within the idea of the "general welfare."

One consequence must be, to enlarge the sphere of discretion allotted to the Executive Magistrate. Even within the Legislative limits properly defined by the Constitution, the difficulty of accommodating legal regulations to a country so great in extent, and so various in its circumstances, has been much felt; and has led to occasional investments of power in the Executive, which involve perhaps as large a portion of discretion, as can be deemed consistent with the nature of the Executive trust. In proportion as the objects of Legislative care might be multiplied, would the time allowed for each be diminished, and the difficulty of providing uniform and particular regulations for all, be increased. From these sources would necessarily ensue a greater latitude to the agency of that department which is always in existence, and which could best mould regulations of a general nature, so as to suit them to the diversity of particular situations. And it is in this latitude, as a supplement to the deficiency of the laws, that the degree of Executive prerogative materially consists.

The other consequence would be, that of an excessive augmentation of the offices, honors and emoluments depending on the Executive will. Add to the present legitimate stock, all those of every description which a consolidation of the States would take from them, and turn over to the Federal Government, and the patronage of the Executive would necessarily be as much swelled in this case, as its prerogative would be in the other.

This disproportionate increase of prerogative and patronage, must, evidently, either enable the Chief Magistrate of the Union, by quiet means, to secure his re-election from time

to time, and finally, to regulate the succession as he might please; or, by giving so transcendant an importance to the office, would render the elections to it so violent and corrupt, that the public voice itself might call for an hereditary, in place of an elective succession. Whichever of these events might follow, the transformation of the republican system of the United States into a monarchy, anticipated by the General Assembly from a consolidation of the States into one sovereignty, would be equally accomplished; and whether it would be into a mixed or an absolute monarchy, might depend on too many contingencies to admit of any certain foresight.

The resolution next in order, is contained in the following terms:

That the General Assembly doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the "Alien and Sedition Acts," passed at the last session of Congress; the first of which exercises a power no where delegated to the Federal Government; and which, by uniting Legislative and Judicial powers to those of Executive, subverts the general principles of a free government, as well as the particular organization and positive provisions of the Federal Constitution; and the other of which acts exercises, in like manner, a power not delegated by the Constitution; but, on the contrary, expressly and positively forbidden by one of the amendments thereto: a power, which, more than any other, ought to produce universal alarm; because it is levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.

The subject of this resolution having, it is presumed, more particularly led the General Assembly into the proceedings which they communicated to the other States, and being in itself of peculiar importance; it deserves the most critical and faithful investigation; for the length of which no other apology will be necessary.

The subject divides itself into *first*, "The Alien Act," *secondly*, "The Sedition Act."

Of the "Alien Act," it is affirmed by the Resolution, 1st. That it exercises a power no where delegated to the Federal Government. 2d. That it unites Legislative and Judicial powers to those of the Executive. 3d. That this union of power, subverts the general principles of free government. 4th. That it subverts the particular organization and positive provisions of the Federal Constitution.

In order to clear the way for a correct view of the first position, several observations will be premised.

In the first place; it is to be borne in mind, that it being a characteristic feature of the Federal Constitution, as it was originally ratified, and an amendment thereto having precisely declared, "That the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people;" it is incumbent in this, as in every other exercise of power by the Federal Government, to prove from the Constitution, that it grants the particular power exercised.

The next observation to be made, is, that much confusion and fallacy, have been thrown into the question, by blending the two cases of *aliens, members of a hostile nation;* and *aliens, members of friendly nations.* These two cases are so obviously, and so essentially distinct, that it occasions no little surprise that the distinction should have been disregarded: and the surprise is so much the greater, as it appears that the two cases are actually distinguished by two separate acts of Congress, passed at the same session, and comprised in the same publication; the one providing for the case of "alien enemies;" the other "concerning aliens" indiscriminately; and consequently extending to aliens of every nation in peace and amity with the United States. With respect to alien enemies, no doubt has been intimated as to the Federal authority over them; the Constitution having expressly delegated to Congress the power to declare war against any nation, and of course to treat it and all its members as enemies. With respect to aliens, who are not enemies, but members of nations in peace and amity with the United States, the power assumed by the act of Congress, is denied to be Constitutional; and it is accordingly against this act, that the protest of the General Assembly is expressly and exclusively directed.

A third observation is, that were it admitted, as is contended, that the "act concerning Aliens," has for its object, not a *penal,* but a *preventive* justice; it would still remain to be proved that it comes within the Constitutional power of the Federal Legislature: and if within its power, that the Legislature has exercised it in a Constitutional manner.

In the administration of preventive justice, the following principles have been held sacred; that some probable ground of suspicion be exhibited before some Judicial authority; that it be supported by oath or affirmation; that the party may avoid being thrown into confinement, by finding pledges or sureties for his legal conduct sufficient in the judgment of some Judicial authority; that he may have the benefit of a writ of habeas cor-

pus, and thus obtain his release, if wrongfully confined; and that he may at any time be discharged from his recognizance, or his confinement, and restored to his former liberty and rights, on the order of the proper Judicial authority, if it shall see sufficient cause.

All these principles of the only preventive justice known to American jurisprudence, are violated by the Alien act. The ground of suspicion is to be judged of, not by any Judicial authority, but by the Executive Magistrate alone: no oath or affirmation is required; if the suspicion be held reasonable by the President, he may order the suspected Alien to depart the territory of the United States, without the opportunity of avoiding the sentence, by finding pledges for his future good conduct; as the President may limit the time of departure as he pleases, the benefit of the writ of habeas corpus, may be suspended with respect to the party, although the Constitution ordains, that it shall not be suspended, unless when the public safety may require it in case of rebellion or invasion, neither of which existed at the passage of the act: and the party being, under the sentence of the President, either removed from the United States, or being punished by imprisonment, or disqualification ever to become a citizen on conviction of not obeying the order of removal, he cannot be discharged from the proceedings against him, and restored to the benefits of his former situation, although the *highest Judicial authority* should see the most sufficient cause for it.

But, in the last place, it can never be admitted, that the removal of Aliens, authorised by the act, is to be considered, not as punishment for an offence; but as a measure of precaution and prevention. If the banishment of an alien from a country into which he has been invited, as the asylum most auspicious to his happiness; a country, where he may have formed the most tender of connections, where he may have vested his entire property, and acquired property of the real and permanent, as well as the moveable and temporary kind; where he enjoys under the laws, a greater share of the blessings of personal security and personal liberty, than he can elsewhere hope for, and where he may have nearly completed his probationary title to citizenship; if, moreover, in the execution of the sentence against him, he is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar casualties incident to a crisis of war, and of unusual licentiousness on that element, and possibly to vindictive purposes which his emigration itself may have provoked; if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.

And if it be a punishment, it will remain to be enquired, whether it can be constitutionally inflicted, on mere suspicion, by the single will of the Executive Magistrate, on persons convicted of no personal offence against the laws of the land, nor involved in any offence against the law of nations, charged on the foreign state of which they are members.

One argument offered in justification of this power exercised over Aliens, is, that the admission of them into the country being of favor, not of right, the favor is at all times revocable.

To this argument it might be answered, that allowing the truth of the inference, it would be no proof of what is required. A question would still occur, whether the Constitution had vested the discretionary power of admitting Aliens, in the Federal Government or in the State Governments.

But it cannot be a true inference, that because the admission of an Alien is a favor, the favor may be revoked at pleasure. A grant of land to an individual, may be of favor, not of right; but the moment the grant is made, the favor becomes a right, and must be forfeited before it can be taken away. To pardon a malefactor may be a favor, but the pardon is not, on that account, the less irrevocable. To admit an Alien to naturalization, is as much a favor, as to admit him to reside in the country; yet it cannot be pretended, that a person naturalized can be deprived of the benefit, any more than a native citizen can be disfranchised.

Again, it is said, that Aliens not being parties to the Constitution the rights and privileges which it secures, cannot be at all claimed by them.

To this reasoning also, it might be answered, that although Aliens are not parties to the Constitution, it does not follow that the Constitution has vested in Congress an absolute power over them. The parties to the Constitution may have granted, or retained, or modified the power over Aliens, without regard to that particular consideration.

But a more direct reply is, that it does not follow, because Aliens are not parties to the Constitution, as citizens are parties to it, that whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws, than they are parties to the Constitution; yet, it will not be disputed, that as they owe on one hand, a temporary obedience, they are entitled in return to their protection and advantage.

If Aliens had no rights under the Constitution, they might not only be banished, but even capitally punished, without a jury or the other incidents to a fair trial. But so far has a contrary principle been carried, in every part of the United States, that except on charges of treason, an Alien has, besides all the

common privileges, the special one of being tried by a jury, of which one half may be also Aliens.

It is said, further, that by the law and practice of nations, Aliens may be removed at discretion, for offences against the law of nations; that Congress are authorised to define and punish such offences; and that to be dangerous to the peace of society is, in Aliens, one of those offences.

The distinction between Alien enemies and Alien friends, is a clear and conclusive answer to this argument. Alien enemies are under the law of nations, and liable to be punished for offences against it. Alien friends, except in the single case of public ministers, are under the municipal law, and must be tried and punished according to that law only.

This argument also, by referring the Alien act, to the power of Congress to define and *punish* offences against the law of nations, yields the point that the act is of a *penal*, not merely of a preventive operation. It must, in truth, be so considered. And if it be a penal act, the punishment it inflicts, must be justified by some offence that deserves it.

Offences for which Aliens, within the jurisdiction of a country, are punishable, are first, offences committed by the nation of which they make a part, and in whose offences they are involved: Secondly, offences committed by themselves alone, without any charge against the nation to which they belong. The first is the case of Alien enemies; the second, the case of Alien friends. In the first case, the offending nation can no otherwise be punished than by war, one of the laws which authorises the expulsion of such of its members, as may be found within the country, against which the offence has been committed. In the second case, the offence being committed by the individual, not by his nation, and against the municipal law, not against the law of nations; the individual only, and not the nation, is punishable; and the punishment must be conducted according to the municipal law, not according to the law of nations. Under this view of the subject, the act of Congress, for the removal of Alien enemies, being conformable to the law of nations, is justified by the Constitution: and the "act," for the removal of Alien friends, being repugnant to the Constitutional principles of municipal law, is unjustifiable.

Nor is the act of Congress, for the removal of Alien friends, more agreeable to the general practice of nations, than it is within the purview of the law of nations. The general practice of nations, distinguishes between Alien friends and Alien enemies. The latter it has proceeded against, according to the law of nations, by expelling them as enemies. The former it

has considered as under a local and temporary allegiance, and entitled to a correspondent protection. If contrary instances are to be found in barbarous countries, under undefined prerogatives, or amid revolutionary dangers; they will not be deemed fit precedents for the government of the United States, even, if not beyond its Constitutional authority.

It is said, that Congress may grant letters of marque and reprisal; that reprisals may be made on persons, as well as property; and that the removal of Aliens may be considered as the exercise in an inferior degree, of the general power of reprisal on persons.

Without entering minutely into a question that does not seem to require it; it may be remarked, that reprisal is a seizure of foreign persons or property, with a view to obtain that justice for injuries done by one State or its members, to another State or its members; for which, a refusal of the aggressor requires such a resort to force under the law of nations. It must be considered as an abuse of words to call the removal of persons from a country, a seizure or reprisal on them: nor is the distinction to be overlooked between reprisals on persons within the country and under the faith of its laws, and on persons out of the country. But, laying aside these considerations; it is evidently impossible to bring the Alien act within the power of granting reprisals; since it does not alledge or imply any injury received from any particular nation, for which this proceeding against its members was intended as a reparation. The proceeding is authorised against Aliens *of every nation;* of nations charged neither with any similar proceeding against American citizens, nor with any injuries for which justice might be sought, in the mode prescribed by the act. Were it true, therefore, that good causes existed for reprisals against one or more foreign nations, and that neither the persons nor property of its members, under the faith of our laws, could plead an exemption; the operation of the act ought to have been limited to the Aliens among us, belonging to such nations. To license reprisals against all nations, for aggressions charged on one only, would be a measure as contrary to every principle of justice and public law, as to a wise policy, and the universal practice of nations.

It is said, that the right of removing Aliens is an incident to the power of war, vested in Congress by the Constitution.

This is a former argument in a new shape only; and is answered by repeating, that the removal of Alien enemies is an incident to the power of war; that the removal of Alien friends, is not an incident to the power of war.

It is said, that Congress are by the Constitution to protect each State against invasion; and that the means of *preventing* invasion are included in the power of protection against it.

The power of war in general, having been before granted by the Constitution; this clause must either be a mere specification for greater caution and certainty, of which there are other examples in the instrument; or be the injunction of a duty, superadded to a grant of the power. Under either explanation, it cannot enlarge the powers of Congress on the subject. The power and the duty to protect each State against an invading enemy, would be the same under the general power, if this regard to greater caution had been omitted.

Invasion is an operation of war. To protect against invasion is an exercise of the power of war. A power, therefore, not incident to war, cannot be incident to a particular modification of war. And as the removal of alien friends, has appeared to be no incident to a general state of war, it cannot be incident to a partial state, or a particular modification of war.

Nor can it ever be granted, that a power to act on a case when it actually occurs, includes a power over all the means that may *tend to prevent* the occurrence of the case. Such a latitude of construction would render unavailing, every practicable definition of particular and limited powers. Under the idea of preventing war in general, as well as invasion in particular, not only an indiscriminate removal of all aliens might be enforced, but a thousand other things still more remote from the operations and precautions appurtenant to war, might take place. A bigotted or tyrannical nation might threaten us with war, unless certain religious or political regulations were adopted by us; yet it never could be inferred, if the regulations which would prevent war, were such as Congress had otherwise no power to make, that the power to make them would grow out of the purpose they were to answer. Congress have power to suppress insurrections, yet it would not be allowed to follow, that they might employ all the means tending to prevent them; of which a system of moral instruction for the ignorant, and of provident support for the poor, might be regarded as among the most efficacious.

One argument for the power of the General Government to remove aliens, would have been passed in silence, if it had appeared under any authority inferior to that of a report, made during the last session of Congress, to the House of Representatives by a Committee, and approved by the House. The doctrine on which this argument is founded, is of so new and so extraordinary a character, and strikes so radically at the

political system of America, that it is proper to state it in the very words of the report.

"The act [concerning aliens,] is said to be unconstitutional, "because to remove aliens, is a direct breach of the Constitu- "tion, which provides, by the 9th section, of the 1st article: "that the migration or importation of such persons as any of "the States shall think proper to admit, shall not be prohibit- "ed by the Congress, prior to the year 1808."

Among the answers given to this objection to the constitutionality of the act, the following very remarkable one is extracted:

"Thirdly, that as the Constitution has *given to the States*, "no power to remove aliens, during the period of the limita- "tion under consideration, in the mean time, on the construc- "tion assumed, there would be no authority in the country, "empowered to send away dangerous aliens, which cannot be "admitted."

The reasoning here used, would not in any view, be conclusive; because there are powers exercised by most other Governments, which, in the United States are withheld by the people, both from the General Government and from the State Governments. Of this sort are many of the powers prohibited by the declarations of right prefixed to the Constitutions, or by the clauses in the Constitutions, in the nature of such declarations. Nay, so far is the political system of the United States distinguishable from that of other countries, by the caution with which powers are delegated and defined; that in one very important case, even of commercial regulation and revenue, the power is absolutely locked up against the hands of both Governments. A tax on exports can be laid by no Constitutional authority whatever. Under a system thus peculiarly guarded, there could surely be no absurdity in supposing, that alien friends, who if guilty of treasonable machinations may be punished, or if suspected on probable grounds, may be secured by pledges or imprisonment, in like manner with permanent citizens, were never meant to be subjected to banishment by any arbitrary and unusual process, either under the one Government or the other.

But, it is not the inconclusiveness of the general reasoning in this passage, which chiefly calls the attention to it. It is the principle assumed by it, that the powers held by the States, are given to them by the Constitution of the United States; and the inference from this principle, that the powers supposed to be necessary which are not so given to the State Governments, must reside in the Government of the United States.

The respect, which is felt for every portion of the constituted authorities, forbids some of the reflections which this singular paragraph might excite; and they are the more readily suppressed, as it may be presumed, with justice perhaps, as well as candour, that inadvertence may have had its share in the error. It would be an unjustifiable delicacy, nevertheless, to pass by so portentous a claim, proceeding from so high an authority, without a monitory notice of the fatal tendencies with which it would be pregnant.

Lastly, it is said, that a law on the same subject with the Alien Act, passed by this State originally in 1785, and re-enacted in 1792, is a proof that a summary removal of suspected aliens, was not heretofore regarded by the Virginia Legislature, as liable to the objections now urged against such a measure.

This charge against Virginia vanishes before the simple remark, that the law of Virginia relates to "suspicious persons "being the subjects of any foreign power or state, who shall "have *made a declaration of war*, or actually *commenced* "*hostilities*, or from whom the President shall apprehend "*hostile designs;*" whereas the act of Congress relates to Aliens, being the subjects of foreign powers and states, who have *neither declared war, nor commenced hostilities, nor from whom hostile designs are apprehended.*

II. It is next affirmed of the Alien Act, that it unites Legislative, Judicial, and Executive powers in the hands of the President.

However difficult it may be to mark, in every case, with clearness and certainty, the line which divides Legislative power, from the other departments of power; all will agree, that the powers referred to these departments may be so general and undefined, as to be of a Legislative, not of an Executive or Judicial nature; and may for that reason be unconstitutional. Details to a certain degree, are essential to the nature and character of a law; and on criminal subjects, it is proper, that details should leave as little as possible to the discretion of those who are to apply and to execute the law. If nothing more were required, in exercising a Legislative trust, than a general conveyance of authority, without laying down any precise rules, by which the authority conveyed, should be carried into effect; it would follow, that the whole power of legislation might be tranferred by the Legislature from itself, and proclamations might become substitutes for laws. A delegation of power in this latitude, would not be denied to be a union of the different powers.

To determine, then, whether the appropriate powers of the distinct departments are united by the act authorising the Ex-

ecutive to remove Aliens, it must be enquired whether it contains such details, definitions and rules, as appertain to the true character of a law; especially, a law by which personal liberty is invaded, property deprived of its value to the owner, and life itself indirectly exposed to danger.

The Alien Act declares, "that it shall be lawful for the President to order all such Aliens as he shall judge *dangerous* to the peace and safety of the United States, or shall have reasonable ground to *suspect*, are concerned in any treasonable, or *secret machinations*, against the government thereof, to depart," &c.

Could a power be well given in terms less definite, less particular, and less precise? To be *dangerous to the public safety;* to be *suspected of secret machinations* against the government: these can never be mistaken for legal rules or certain definitions. They leave every thing to the President. His will is the law.

But, it is not a Legislative power only that is given to the President. He is to stand in the place of the Judiciary also. His suspicion is the only evidence which is to convict: his order, the only judgment which is to be executed.

Thus, it is, the President whose will is to designate the offensive conduct; it is his will that is to ascertain the individuals on whom it is charged; and it is his will, that is to cause the sentence to be executed. It is rightly affirmed, therefore, that the act unites Legislative and Judicial powers to those of the Executive.

III. It is affirmed, that this union of power subverts the general principles of free government.

It has become an axiom in the science of government, that a separation of the Legislative, Executive, and Judicial departments, is necessary to the preservation of public liberty. No where has this axiom been better understood in theory, or more carefully pursued in practice, than in the United States.

IV. It is affirmed that such a union of powers subverts the particular organization and positive provisions of the Federal Constitution.

According to the particular organization of the Constitution, its Legislative powers are vested in the Congress, its Executive powers in the President, and its Judicial powers in a supreme and inferior tribunals. The union of any two of these powers, and still more of all three, in any one of these departments, as has been shewn to be done by the Alien Act, must consequently subvert the constitutional organization of them.

That positive provisions, in the Constitution, securing to individuals the benefits of fair trial, are also violated by the uni-

on of powers in the Alien Act, necessarily results from the two facts, that the act relates to Alien friends, and that Alien friends being under the municipal law only, are entitled to its protection.

The *second* object against which the resolution protests, is the Sedition Act.

Of this act it is affirmed, 1. That it exercises in like manner a power not delegated by the Constitution. 2. That the power, on the contrary, is expressly and positively forbidden by one of the amendments to the Constitution. 3. That this is a power, which more than any other ought to produce universal alarm; because it is levelled against that right of freely examining public characters and measures, and of free communication thereon, which has ever been justly deemed the only effectual guardian of every other right.

1. That it exercises a power not delegated by the Constitution.

Here again, it will be proper to recollect, that the Federal Government being composed of powers specifically granted with a reservation of all others to the States or to the People, the positive authority under which the Sedition Act could be passed must be produced by those who assert its constitutionality. In what part of the Constitution, then, is this authority to be found?

Several attempts have been made to answer this question, which will be examined in their order. The committee will begin with one, which has filled them with equal astonishment and apprehension; and which, they cannot but persuade themselves, must have the same effect on all, who will consider it with coolness and impartiality, and with a reverence for our Constitution, in the true character in which it issued from the sovereign authority of the people. The committee refer to the doctrine lately advanced as a sanction to the Sedition Act; "that the common or unwritten law," a law of vast extent and complexity, and embracing almost every possible subject of legislation, both civil and criminal, makes a part of the law of these States, in their united and national capacity.

The novelty, and in the judgment of the committee, the extravagance of this pretension, would have consigned it to the silence, in which they have passed by other arguments, which an extraordinary zeal for the act has drawn into the discussion: But, the auspices, under which this innovation presents itself, have constrained the committee to bestow on it an attention, which other considerations might have forbidden.

In executing the task, it may be of use, to look back to the colonial state of this country, prior to the revolution; to trace

the effect of the revolution which converted the colonies into independent States; to enquire into the import of the articles of confederation, the first instrument by which the union of the States was regularly established; and finally, to consult the constitution of 1788, which is the oracle that must decide the important question.

In the state prior to the revolution, it is certain that the common law under different limitations, made a part of the colonial codes. But whether it be understood that the original colonists brought the law with them, or made it their law by adoption; it is equally certain, that it was the separate law of each colony within its respective limits, and was unknown to them, as a law pervading and operating through the whole, as one society.

It could not possibly be otherwise. The common law was not the same in any two of the colonies; in some, the modifications were materially and extensively different. There was no common Legislature, by which, a common will could be expressed in the form of a law; nor any common magistracy, by which such a law could be carried into practice. The will of each colony, alone and separately, had its organs for these purposes.

This stage of our political history, furnishes no foothold for the patrons of this new doctrine.

Did then the principle or operation of the great event which made the colonies independent States, imply or introduce the common law, as a law of the Union?

The fundamental principle of the revolution was, that the colonies were co-ordinate members with each other, and with Great Britain; of an empire, united by a common Executive sovereign, but not united by any common Legislative sovereign. The Legislative power was maintained to be as complete in each American Parliament, as in the British Paliament. And the royal prerogative was in force in each colony, by virtue of its acknowledging the King for its Executive Magistrate, as it was in Great Britain, by virtue of a like acknowledgment there. A denial of these principles by Great Britain, and the assertion of them by America, produced the revolution.

There was a time indeed, when an exception to the Legislative separation of the several component and co-equal parts of the empire, obtained a degree of acquiescence. The British Parliament was allowed to regulate the trade with foreign nations, and between the different parts of the empire. This was, however, mere practice without right, and contrary to the true theory of the Constitution. The conveniency of some

regulations, in both those cases, was apparent; and as there was no Legislature with power over the whole, nor any constitutional pre-eminence among the Legislatures of the several parts, it was natural for the Legislature of that particular part which was the eldest and the largest, to assume this function, and for the others to acquiesce in it. This tacit arrangement was the less criticised, as the regulations established by the British Parliament operated in favor of that part of the empire which seemed to bear the principal share of the public burdens, and were regarded as an indemnification of its advances for the other parts. As long as this regulating power was confined to the two objects of conveniency and equity, it was not complained of, nor much enquired into. But, no sooner was it perverted to the selfish views of the party assuming it, than the injured parties began to feel and to reflect; and the moment the claim to a direct and indefinite power was ingrafted on the precedent of the regulating power, the whole charm was dissolved, and every eye opened to the usurpation. The assertion by G. B. of a power to make laws for the other members of the empire *in all cases whatsoever*, ended in the discovery, that she had a right to make laws for them *in no cases whatsoever*.

Such being the ground of our revolution, no support nor color can be drawn from it, for the doctrine that the common law is binding on these States as one society. The doctrine, on the contrary, is evidently repugnant to the fundamental principle of the revolution.

The articles of confederation, are the next source of information on this subject.

In the interval between the commencement of the revolution and the final ratification of these articles, the nature and extent of the Union was determined by the circumstances of the crisis, rather than by any accurate delineation of the general authority. It will not be alleged, that the "common law" could have had any legitimate birth as a law of the United States during that state of things. If it came as such into existence at all, the charter of confederation must have been its parent.

Here again, however, its pretensions are absolutely destitute of foundation. This instrument does not contain a sentence or syllable that can be tortured into a countenance of the idea, that the parties to it were, with respect to the objects of the common law, to form one community. No such law is named or implied, or alluded to, as being in force, or as brought into force by that compact. No provision is made by which such a law could be carried into operation; whilst, on

the other hand, every such inference or pretext is absolutely precluded by article 2d, which declares "that each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

Thus far it appears, that not a vestige of this extraordinary doctrine can be found in the origin or progress of American institutions. The evidence against it has, on the contrary, grown stronger at every step, till it has amounted to a formal and positive exclusion, by written articles of compact among the parties concerned.

Is this exclusion revoked, and the common law introduced as a national law, by the present Constitution of the United States? This is the final question to be examined.

It is readily admitted, that particular parts of the common law may have a sanction from the Constitution, so far as they are necessarily comprehended in the technical phrases which express the powers delegated to the government; and so far also, as such other parts may be adopted by Congress as necessary and proper for carrying into execution the powers expressly delegated. But, the question does not relate to either of these portions of the common law. It relates to the common law beyond these limitations.

The only part of the Constitution which seems to have been relied on in this case, is the 2d sect. of art. III. "The Judicial "power shall extend to all cases, *in law and equity*, arising "*under this Constitution*, the laws of the United States, and "Treaties made or which shall be made under their authority."

It has been asked what cases, distinct from those arising under the laws and treaties of the United States, can arise under the Constitution, other than those arising under the common law; and it is inferred, that the common law is accordingly adopted or recognized by the Constitution.

Never, perhaps, was so broad a construction applied to a text so clearly unsusceptible of it. If any color for the inference could be found, it must be in the impossibility of finding any other cases in law and equity, within the provision of the Constitution, to satisfy the expression; and rather than resort to a construction affecting so essentially the whole character of the government, it would perhaps be more rational to consider the expression as a mere pleonasm or inadvertence. But, it is not necessary to decide on such a dilemma. The expression is fully satisfied, and its accuracy justified, by two descriptions of cases, to which the Judicial authority is extended, and neither of which implies that the common law is the law of the United

States. One of these descriptions comprehends the cases growing out of the restrictions on the Legislative power of the States. For example, it is provided that "no State shall emit bills of credit," or "make any thing but gold and silver coin a tender in payment of debts." Should this prohibition be violated, and a suit *between citizens of the same State* be the consequence, this would be a case arising under the Constitution before the Judicial power of the United States. A second description comprehends suits between citizens and foreigners, or citizens of different States, to be decided according to the State or foreign laws; but submitted by the Constitution to the Judicial power of the United States; the Judicial power being, in several instances, extended beyond the Legislative power of the United States.

To this explanation of the text, the following observations may be added:

The expression, "cases in law and equity," is manifestly confined to cases of a civil nature; and would exclude cases of criminal jurisdiction. Criminal cases in law and equity would be a language unknown to the law.

The succeeding paragraph of the same section is in harmony with this construction. It is in these words: "In all cases affecting Ambassadors, other public Ministers, and Consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. *In all* the other cases [including cases in law and equity arising under the Constitution] the Supreme Court shall have *appellate* jurisdiction both as to law and *fact;* with such exceptions, and under such regulations, as Congress shall make."

This paragraph, by expressly giving an *appellate* jurisdiction, in cases of law and equity arising under the Constitution, to *fact*, as well as to law, clearly excludes criminal cases, where the trial by jury is secured; because the fact, in such cases, is not a subject of appeal. And, although the appeal is liable to such *exceptions* and regulations as Congress may adopt, yet it is not to be supposed that an *exception* of *all* criminal cases could be contemplated; as well because a discretion in Congress to make or omit the exception would be improper, as because it would have been unnecessary. The exception could as easily have been made by the Constitution itself, as referred to the Congress.

Once more; the amendment last added to the Constitution, deserves attention, as throwing light on this subject. "The Judicial power of the United States shall not be construed to extend to any suit in *law* or *equity*, commenced or prosecuted against one of the United States, by citizens of another State,

or by citizens or subjects of any foreign power." As it will not be pretended that any criminal proceeding could take place against a State; the terms *law* or *equity*, must be understood as appropriate to *civil*, in exclusion of *criminal* cases.

From these considerations, it is evident, that this part of the Constitution, even if it could be applied at all, to the purpose for which it has been cited, would not include any cases whatever of a criminal nature; and consequently, would not authorise the inference from it, that the Judicial authority extends to *offences* against the common law, as offences arising under the Constitution.

It is further to be considered, that even if this part of the Constitution could be strained into an application to every common law case, criminal as well as civil, it could have no effect in justifying the Sedition Act; which is an exercise of Legislative, and not of Judicial power: and it is the Judicial power only, of which the extent is defined in this part of the Constitution.

There are two passages in the Constitution, in which a description of the law of the United States, is found. The first is contained in art. III. sec. 2, in the words following: "This Constitution, the laws of the United States, and treaties made, or which shall be made under their authority." The second is contained in the 2d paragraph of art. VI. as follows: "This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." The first of these descriptions was meant as a guide to the Judges of the United States; the second, as a guide to the Judges in the several States. Both of them consist of an enumeration, which was evidently meant to be precise and complete. If the common law had been understood to be a law of the United States, it is not possible to assign a satisfactory reason why it was not expressed in the enumeration.

In aid of these objections, the difficulties and confusion inseparable from a constructive introduction of the common law, would afford powerful reasons against it.

Is it to be the common law with, or without the British statutes?

If without the statutory amendments, the vices of the code would be insupportable!

If with these amendments, what period is to be fixed for limiting the British authority over our laws?

Is it to be the date of the eldest or the youngest of the Colonies?

Or are the dates to be thrown together, and a medium deduced?

Or is our independence to be taken for the date?

Is, again, regard to be had to the various changes in the common law made by the local codes of America?

Is regard to be had to such changes, subsequent, as well as prior, to the establishment of the Constitution?

Is regard to be had to future, as well as past changes?

Is the law to be different in every State, as differently modified by its code; or are the modifications of any particular State, to be applied to all?

And on the latter supposition, which among the State codes would form the standard?

Questions of this sort might be multiplied with as much ease, as there would be difficulty in answering them.

The consequences flowing from the proposed construction, furnish other objections equally conclusive; unless the text were peremptory in its meaning, and consistent with other parts of the instrument.

These consequences may be in relation to the Legislative authority of the United States; to the Executive authority; to the Judicial authority; and to the Governments of the several States.

If it be understood, that the common law is established by the Constitution, it follows that no part of the law can be altered by the Legislature; such of the statutes, already passed, as may be repugnant thereto, would be nullified; particularly the "Sedition Act" itself, which boasts of being a melioration of the common law; and the whole code, with all its incongruities, barbarisms, and bloody maxims, would be inviolably saddled on the good people of the United States.

Should this consequence be rejected, and the common law be held, like other laws, liable to revision and alteration, by the authority of Congress; it then follows, that the authority of Congress is co-extensive with the objects of common law; that is to say, with every object of Legislation: For, to every such object, does some branch or other of the common law extend. The authority of Congress would, therefore, be no longer under the limitations, marked out in the Constitution. They would be authorised to legislate in all cases whatsoever.

In the next place, as the President possesses the executive powers of the Constitution, and is to see that the laws be faithfully executed, his authority also must be co-extensive with every branch of the common law. The additions which this would make to his power, though not readily to be estimated, claim the most serious attention.

This is not all; it will merit the most profound consideration, how far an indefinite admission of the common law, with a latitude in construing it, equal to the construction by which it is deduced from the Constitution, might draw after it the various prerogatives making part of the unwritten law of England. The English Constitution itself is nothing more than a composition of unwritten laws and maxims.

In the third place, whether the common law be admitted as of legal or of Constitutional obligation, it would confer on the Judicial department a discretion little short of a Legislative power.

On the supposition of its having a Constitutional obligation, this power in the Judges would be permanent and irremediable by the Legislature. On the other supposition, the power would not expire, until the Legislature should have introduced a full system of statutory provisions. Let it be observed, too, that besides all the uncertainties above enumerated, and which present an immense field for judicial discretion, it would remain with the same department to decide what parts of the common law would, and what would not, be properly applicable to the circumstances of the United States.

A discretion of this sort has always been lamented as incongruous and dangerous, even in the Colonial and State courts; although so much narrowed by positive provisions in the local codes on all the principal subjects embraced by the common law. Under the United States, where so few laws exist on those subjects, and where so great a lapse of time must happen before the vast chasm could be supplied, it is manifest that the power of the Judges over the law would, in fact, erect them into Legislators; and, that for a long time, it would be impossible for the citizens to conjecture, either what was, or would be law.

In the last place, the consequence of admitting the common law as the law of the United States, on the authority of the individual States, is as obvious as it would be fatal. As this law relates to every subject of Legislation, and would be paramount to the Constitutions and laws of the States; the admission of it would overwhelm the residuary sovereignty of the States, and by one constructive operation, new-model the whole political fabric of the country.

From the re-view thus taken of the situation of the American colonies prior to their Independence; of the effect of this event on their situation; of the nature and import of the articles of confederation; of the true meaning of the passage in the existing Constitution from which the common law has been deduced; of the difficulties and uncertainties incident to the

doctrine; and of its vast consequences in extending the powers of the Federal Government, and in superseding the authorities of the State Governments; the committee feel the utmost confidence in concluding, that the common law never was, nor by any fair construction, ever can be, deemed a law for the American people as one community; and they indulge the strongest expectation that the same conclusion will finally be drawn, by all candid and accurate enquirers into the subject. It is indeed distressing to reflect, that it ever should have been made a question, whether the Constitution, on the whole face of which is seen so much labor to enumerate and define the several objects of Federal power, could intend to introduce in the lump, in an indirect manner, and by a forced construction of a few phrases, the vast and multifarious jurisdiction involved in the common law; a law filling so many ample volumes; a law overspreading the entire field of Legislation; and a law that would sap the foundation of the Constitution as a system of limited and specified powers. A severer reproach could not in the opinion of the committee be thrown on the Constitution, on those who framed, or on those who established it, than such a supposition would throw on them.

The argument, then, drawn from the common law, on the ground of its being adopted or recognised by the Constitution, being inapplicable to the Sedition Act, the committee will proceed to examine the other arguments which have been founded on the Constitution.

They will waste but little time on the attempt to cover the act by the preamble to the Constitution; it being contrary to every acknowledged rule of construction, to set up this part of an instrument, in opposition to the plain meaning, expressed in the body of the instrument. A preamble usually contains the general motives or reasons, for the particular regulations or measures which follow it; and is always understood to be explained and limited by them. In the present instance, a contrary interpretation would have the inadmissible effect, of rendering nugatory or improper, every part of the Constitution which succeeds the preamble.

The paragraph in Art. 1, Sec. 8, which contains the power to lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defence and general welfare, having been already examined, will also require no particular attention in this place. It will have been seen that in its fair and consistent meaning, it cannot enlarge the enumerated powers vested in Congress.

The part of the Constitution which seems most to be recurred to, in defence of the "Sedition Act," is the last clause of

the above section, empowering Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

The plain import of this clause is, that Congress shall have all the incidental or instrumental powers necessary and proper for carrying into execution all the express powers; whether they be vested in the Government of the United States, more collectively, or in the several departments, or officers thereof. It is not a grant of new powers to Congress, but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution, those otherwise granted, are included in the grant.

Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is, whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next enquiry must be, whether it is properly an incident to an express power, and necessary to its execution. If it be, it may be exercised by Congress. If it be not, Congress cannot exercise it.

Let the question be asked, then, whether the power over the press exercised in the "Sedition Act," be found among the powers expressly vested in the Congress? This is not pretended.

Is there any express power, for executing which it is a necessary and proper power?

The power which has been selected, as least remote, in answer to this question, is that of "suppressing insurrections;" which is said to imply a power to *prevent* insurrections, by punishing whatever may *lead* or *tend* to them. But, it surely cannot, with the least plausibility, be said, that a regulation of the press, and a punishment of libels, are exercises of a power to suppress insurrections. The most that could be said, would be, that the punishment of libels, if it had the tendency ascribed to it, might prevent the occasion of passing or executing laws necessary and proper for the suppression of insurrections.

Has the Federal Government no power, then, to prevent as well as to punish resistance to the laws?

They have the power, which the Constitution deemed most proper, in their hands for the purpose. The Congress has power, before it happens, to pass laws for punishing it; and the Executive and Judiciary have power to enforce those laws when it does happen.

It must be recollected by many, and could be shewn to the satisfaction of all, that the construction here put on the terms

"necessary and proper," is precisely the construction which prevailed during the discussions and ratifications of the Constitution. It may be added, and cannot too often be repeated, that it is a construction absolutely necessary to maintain their consistency with the peculiar character of the government, as possessed of particular and defined powers only; not of the general and indefinite powers vested in ordinary governments. For, if the power to *suppress insurrections*, includes a power to *punish libels;* or if the power to *punish*, includes a power to *prevent*, by all the means that may have that *tendency;* such is the relation and influence among the most remote subjects of legislations, that a power over a very few, would carry with it a power over all. And it must be wholly immaterial, whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution, limited powers.

This branch of the subject will be closed with a reflection which must have weight with all; but more especially with those who place peculiar reliance on the judicial exposition of the Constitution, as the bulwark provided against undue extensions of the legislative power. If it be understood that the powers implied in the specified powers, have an immediate and appropriate relation to them, as means, necessary and proper for carrying them into execution, questions on the constitutionality of laws passed for this purpose, will be of a nature sufficiently precise and determinate for judicial cognizance and controul! If, on the other hand, Congress are not limited in the choice of means by any such appropriate relation of them to the specified powers; but may employ all such means as they may deem fitted to *prevent*, as well as to *punish*, crimes subjected to their authority; such as may have a *tendency* only to *promote* an object for which they are authorised to provide; every one must perceive, that questions relating to means of this sort, must be questions of mere policy and expediency; on which, legislative discretion alone can decide, and from which the judicial interposition and controul are completely excluded.

2. The next point which the resolution requires to be proved, is, that the power over the press exercised by the Sedition Act, is positively forbidden by one of the amendments to the Constitution.

The amendment stands in these words—"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, *or abridging the freedom of speech or of the press;* or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

In the attempts to vindicate the "Sedition Act," it has been contended, 1. That the "freedom of the press" is to be determined by the meaning of these terms in the common law. 2. That the article supposes the power over the press to be in Congress, and prohibits them only from *abridging* the freedom allowed to it by the common law.

Although it will be shewn, in examining the second of these positions, that the amendment is a denial to Congress of all power over the press, it may not be useless to make the following observations on the first of them.

It is deemed to be a sound opinion, that the Sedition Act, in its definition of some of the crimes created, is an abridgment of the freedom of publication, recognized by principles of the common law in England.

The freedom of the press under the common law, is, in the defences of the Sedition Act, made to consist in an exemption from all *previous* restraint on printed publications, by persons authorised to inspect and prohibit them. It appears to the Committee, that this idea of the freedom of the press, can never be admitted to be the American idea of it: since a law inflicting penalties on printed publications, would have a similar effect with a law authorising a previous restraint on them. It would seem a mockery to say, that no law should be passed, preventing publications from being made, but that laws might be passed for punishing them in case they should be made.

The essential difference between the British Government, and the American Constitutions, will place this subject in the clearest light.

In the British Government, the danger of encroachments on the rights of the People, is understood to be confined to the Executive Magistrate. The representatives of the People in the Legislature, are not only exempt themselves, from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the Executive. Hence it is a principle, that the Parliament is unlimited in its power; or, in their own language, is omnipotent. Hence too, all the ramparts for protecting the rights of the People, such as their Magna Charta, their Bill of Rights, &c. are not reared against the Parliament, but against the royal prerogative. They are merely Legislative precautions, against Executive usurpations. Under such a Government as this, an exemption of the press from previous restraint by licensers appointed by the King, is all the freedom that can be secured to it.

In the United States, the case is altogether different. The People, not the Government, possess the absolute sovereignty. The Legislature, no less than the Executive, is under limita-

tions of power. Encroachments are regarded as possible from the one, as well as from the other. Hence in the United States, the great and essential rights of the People are secured against Legislative, as well as against Executive ambition. They are secured, not by laws paramount to prerogative; but by Constitutions paramount to laws. This security of the freedom of the press requires, that it should be exempt, not only from previous restraint by the Executive, as in Great Britain; but from Legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws.

The state of the press, therefore, under the common law, cannot in this point of view, be the standard of its freedom in the United States.

But there is another view, under which it may be necessary to consider this subject. It may be alledged, that although the security for the freedom of the press, be different in Great Britain and in this country; being a legal security only in the former, and a constitutional security in the latter; and although there may be a further difference, in an extension of the freedom of the press, here, beyond an exemption from previous restraint, to an exemption from subsequent penalties also; yet that the actual legal freedom of the press, under the common law, must determine the degree of freedom, which is meant by the terms, and which is constitutionally secured against both previous and subsequent restraints.

The Committee are not unaware of the difficulty of all general questions, which may turn on the proper boundary between the liberty and licentiousness of the press. They will leave it therefore for consideration only, how far the difference between the nature of the British Government, and the nature of the American Governments, and the practice under the latter, may shew the degree of rigor in the former, to be inapplicable to, and not obligatory in the latter.

The nature of Governments elective, limited and responsible, in all their branches, may well be supposed to require a greater freedom of animadversion, than might be tolerated by the genius of such a Government as that of Great Britain. In the latter, it is a maxim, that the King, an hereditary, not a responsible magistrate, can do no wrong; and that the Legislature, which in two thirds of its composition, is also hereditary, not responsible, can do what it pleases. In the United States, the Executive magistrates are not held to be infallible, nor the Legislatures to be omnipotent; and both being elective, are both responsible. Is it not natural and necessary, under

such different circumstances, that a different degree of freedom, in the use of the press, should be contemplated?

Is not such an inference favored by what is observable in Great Britain itself? Notwithstanding the general doctrine of the common law, on the subject of the press, and the occasional punishment of those, who use it with a freedom offensive to the Government; it is well known, that with respect to the responsible members of the Government, where the reasons operating here, become applicable there, the freedom exercised by the press, and protected by the public opinion, far exceeds the limits prescribed by the ordinary rules of law. The ministry, who are responsible to impeachment, are at all times, animadverted on, by the press, with peculiar freedom; and during the elections for the House of Commons, the other responsible part of the Government, the press is employed with as little reserve towards the candidates.

The practice in America must be entitled to much more respect. In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing, the freedom of the press has stood; on this footing it yet stands. And it will not be a breach, either of truth or of candor, to say, that no persons or presses are in the habit of more unrestrained animadversions on the proceedings and functionaries of the State Governments, than the persons and presses most zealous in vindicating the act of Congress for punishing similar animadversions on the Government of the United States.

The last remark will not be understood, as claiming for the State Governments, an immunity greater than they have heretofore enjoyed. Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true, than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches, to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect, that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity, over error and oppression; who reflect, that to the same beneficent source, the United States owe much of the lights which conducted them to the rank of a free and independent nation; and which have improved their political system, into a shape so auspicious to their happiness. Had "Sedition Acts," forbidding every publication that might bring the constituted agents into contempt or

disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press; might not the United States have been languishing at this day, under the infirmities of a sickly confederation? Might they not possibly be miserable colonies, groaning under a foreign yoke?

To these observations, one fact will be added, which demonstrates that the common law cannot be admitted as the *universal* expositor of American terms, which may be the same with those contained in that law. The freedom of conscience, and of religion, are found in the same instruments, which assert the freedom of the press. It will never be admitted, that the meaning of the former, in the common law of England, is to limit their meaning in the United States.

Whatever weight may be allowed to these considerations, the Committee do not, however, by any means intend to rest the question on them. They contend that the article of amendment, instead of supposing in Congress a power that might be exercised over the press, provided its freedom was not abridged, was meant as a positive denial to Congress, of any power whatever on the subject.

To demonstrate that this was the true object of the article, it will be sufficient to recall the circumstances which led to it, and to refer to the explanation accompanying the article.

When the Constitution was under the discussions which preceded its ratification, it is well known, that great apprehensions were expressed by many, lest the omission of some positive exception from the powers delegated, of certain rights, and of the freedom of the press particularly, might expose them to the danger of being drawn by construction within some of the powers vested in Congress; more especially of the power to make all laws necessary and proper for carrying their other powers into execution. In reply to this objection, it was invariably urged to be a fundamental and characteristic principle of the Constitution, that all powers not given by it, were reserved; that no powers were given beyond those enumerated in the Constitution, and such as were fairly incident to them; that the power over the rights in question, and particularly over the press, was neither among the enumerated powers, nor incident to any of them; and consequently that an exercise of any such power, would be a manifest usurpation. It is painful to remark, how much the arguments now employed in behalf of the Sedition Act, are at variance with the reasoning which then justified the Constitution, and invited its ratification.

From this posture of the subject, resulted the interesting question in so many of the Conventions, whether the doubts

and dangers ascribed to the Constitution, should be removed by any amendments previous to the ratification, or be postponed, in confidence that as far as they might be proper, they would be introduced in the form provided by the Constitution. The latter course was adopted; and in most of the States, the ratifications were followed by propositions and instructions for rendering the Constitution more explicit, and more safe to the rights, not meant to be delegated by it. Among those rights, the freedom of the press, in most instances, is particularly and emphatically mentioned. The firm and very pointed manner, in which it is asserted in the proceedings of the Convention of this State, will be hereafter seen.

In pursuance of the wishes thus expressed, the first Congress that assembled under the Constitution, proposed certain amendments, which have since, by the necessary ratifications, been made a part of it; among which amendments, is the article containing, among other prohibitions on the Congress, an express declaration that they should make no law abridging the freedom of the press.

Without tracing farther the evidence on this subject, it would seem scarcely possible to doubt, that no power whatever over the press, was supposed to be delegated by the Constitution, as it originally stood; and that the amendment was intended as a positive and absolute reservation of it.

But the evidence is still stronger. The proposition of amendments made by Congress, is introduced in the following terms: "*The Conventions of a number of the States having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstructions or abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institutions.*"

Here is the most satisfactory and authentic proof, that the several amendments proposed, were to be considered as either declaratory or restrictive; and whether the one or the other, as corresponding with the desire expressed by a number of the States, and as extending the ground of public confidence in the Government.

Under any other construction of the amendment relating to the press, than that it declared the press to be wholly exempt from the power of Congress, the amendment could neither be said to correspond with the desire expressed by a number of the States, nor be calculated to extend the ground of public confidence in the Government.

Nay more; the construction employed to justify the "Sedition Act," would exhibit a phenomenon, without a parallel in the political world. It would exhibit a number of respectable States, as denying first that any power over the press was delegated by the Constitution; as proposing next, that an amendment to it, should explicitly declare that no such power was delegated; and finally, as concurring in an amendment actually recognizing or delegating such a power.

Is then the Federal Government, it will be asked, destitute of every authority for restraining the licentiousness of the press, and for shielding itself against the libellous attacks which may be made on those who administer it?

The Constitution alone can answer this question. If no such power be expressly delegated, and it be not both necessary and proper to carry into execution an express power; above all, if it be expressly forbidden by a declaratory amendment to the Constitution, the answer must be, that the Federal Government is destitute of all such authority.

And might it not be asked in turn, whether it is not more probable, under all the circumstances which have been reviewed, that the authority should be withheld by the Constitution, than that it should be left to a vague and violent construction; whilst so much pains were bestowed in enumerating other powers, and so many less important powers are included in the enumeration?

Might it not be likewise asked, whether the anxious circumspection which dictated so many *peculiar* limitations on the general authority, would be unlikely to exempt the press altogether from that authority? The peculiar magnitude of some of the powers necessarily committed to the Federal Government; the peculiar duration required for the functions of some of its departments; the peculiar distance of the seat of its proceedings from the great body of its constituents; and the peculiar difficulty of circulating an adequate knowledge of them through any other channel; will not these considerations, some or other of which produced other exceptions from the powers of ordinary Governments, all together, account for the policy of binding the hand of the Federal Government, from touching the channel which alone can give efficacy to its responsibility to its constituents; and of leaving those who administer it, to a remedy for their injured reputations, under the same laws, and in the same tribunals, which protect their lives, their liberties, and their properties?

But the question does not turn either on the wisdom of the Constitution, or on the policy which gave rise to its particular organization. It turns on the actual meaning of the instru-

ment; by which it has appeared, that a power over the press is clearly excluded, from the number of powers delegated to the Federal Government.

3. And in the opinion of the Committee, well may it be said, as the resolution concludes with saying, that the unconstitutional power exercised over the press by the "Sedition Act," ought "more than any other, to produce universal "alarm; because it is levelled against that right of freely exa-"mining public characters and measures, and of free commu-"nication among the people thereon, which has ever been "justly deemed the only effectual guardian of every other "right."

Without scrutinizing minutely into all the provisions of the "Sedition Act," it will be sufficient to cite so much of section 2, as follows: "And be it further enacted, that if any person "shall write, print, utter or publish, or shall cause or procure "to be written, printed, uttered or published, or shall know-"ingly and willingly assist or aid in writing, printing, utter-"ing or publishing any false, scandalous and malicious wri-"ting or writings against the Government of the United States, "or either House of the Congress of the United States, or the "President of the United States, *with an intent to defame "the said Government, or either House of the said Con-"gress, or the President, or to bring them, or either of "them, into contempt or disrepute; or to excite against "them, or either, or any of them, the hatred of the good "people of the United States, &c. Then such person being "thereof convicted before any Court of the United States, "having jurisdiction thereof, shall be punished by a fine "not exceeding two thousand dollars, and by imprisonment "not exceeding two years."*

On this part of the act, the following observations present themselves:

1. The Constitution supposes that the President, the Congress, and each of its Houses, may not discharge their trusts, either from defect of judgment, or other causes. Hence, they are all made responsible to their constituents, at the returning periods of election; and the President, who is singly entrusted with very great powers, is, as a further guard, subjected to an intermediate impeachment.

2. Should it happen, as the Constitution supposes it may happen, that either of these branches of the Government may not have duly discharged its trust; it is natural and proper, that according to the cause and degree of their faults, they should be brought into contempt or disrepute, and incur the hatred of the people.

3. Whether it has, in any case, happened that the proceedings of either, or all of those branches, evinces such a violation of duty as to justify a contempt, a disrepute or hatred among the people, can only be determined by a free examination thereof, and a free communication among the people thereon.

4. Whenever it may have actually happened, that proceedings of this sort are chargeable on all or either of the branches of the Government, it is the duty as well as right of intelligent and faithful citizens, to discuss and promulge them freely, as well to controul them by the censorship of the public opinion, as to promote a remedy according to the rules of the Constitution. And it cannot be avoided, that those who are to apply the remedy must feel, in some degree, a contempt or hatred against the transgressing party.

5. As the act was passed on July 14, 1798, and is to be in force until March 3, 1801, it was of course, that during its continuance, two elections of the entire House of Representatives, an election of a part of the Senate, and an election of a President, were to take place.

6. That consequently, during all these elections, intended by the Constitution to preserve the purity, or to purge the faults of the administration, the great remedial rights of the people were to be exercised, and the responsibility of their public agents to be skreened, under the penalties of this act.

May it not be asked of every intelligent friend to the liberties of his country, whether the power exercised in such an act as this, ought not to produce great and universal alarm? Whether a rigid execution of such an act, in time past, would not have repressed that information and communication among the people, which is indispensable to the just exercise of their electoral rights? And whether such an act, if made perpetual, and enforced with rigor, would not, in time to come, either destroy our free system of Government, or prepare a convulsion that might prove equally fatal to it?

In answer to such questions, it has been pleaded that the writings and publications forbidden by the act, are those only which are false and malicious, and intended to defame; and merit is claimed for the privilege allowed to authors to justify, by proving the truth of their publications, and for the limitations to which the sentence of fine and imprisonment is subjected.

To those who concurred in the act, under the extraordinary belief, that the option lay between the passing of such an act, and leaving in force the common law of libels, which punishes truth equally with falsehood; and submits the fine and impri-

sonment to the indefinite discretion of the court, the merit of good intentions ought surely not to be refused. A like merit may perhaps be due for the discontinuance of the *corporal punishment*, which the common law also leaves to the discretion of the court. This merit of *intention*, however, would have been greater, if the several mitigations had not been limited to so short a period; and the apparent inconsistency would have been avoided, between justifying the act at one time, by contrasting it with the rigors of the common law, otherwise in force; and at another time by appealing to the nature of the crisis, as requiring the temporary rigor exerted by the act.

But, whatever may have been the meritorious intentions of all or any who contributed to the Sedition Act; a very few reflections will prove, that its baneful tendency is little diminished by the privilege of giving in evidence the truth of the matter contained in political writings.

In the first place, where simple and naked facts alone are in question, there is sufficient difficulty in some cases, and sufficient trouble and vexation in all, of meeting a prosecution from the government, with the full and formal proof, necessary in a Court of law.

But, in the next place, it must be obvious to the plainest minds, that opinions, and inferences, and conjectural observations, are not only in many cases inseparable from the facts, but may often be more the objects of the prosecution than the facts themselves; or may even be altogether abstracted from particular facts; and that opinions and inferences, and conjectural observations, cannot be subjects of that kind of proof which appertains to facts, before a Court of law.

Again: It is no less obvious, that the *intent* to defame or bring into contempt or disrepute, or hatred, which is made a condition of the offence created by the act, cannot prevent its pernicious influence, on the freedom of the press. For, omitting the enquiry, how far the malice of the intent is an inference of the law from the mere publication; it is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures: because those who engage in such discussions, must expect and *intend* to excite these unfavorable sentiments, so far as they may be thought to be deserved. To prohibit, therefore, the intent to excite those unfavorable sentiments against those who administer the government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them, is equivalent to a prohibition of discussions having

that tendency and effect; which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions on their characters and conduct. Nor can there be a doubt, if those in public trust be shielded by penal laws from such strictures of the press, as may expose them to contempt or disrepute, or hatred, where they may deserve it, that in exact proportion as they may deserve to be exposed, will be the certainty and criminality of the intent to expose them and the vigilance of prosecuting and punishing it; nor a doubt, that a government thus intrenched in penal statutes, against the just and natural effects of a culpable administration, will easily evade the responsibility, which is essential to a faithful discharge of its duty.

Let it be recollected, lastly, that the right of electing the members of the government, constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right, depends on the knowledge of the comparative merits and demerits of the candidates for public trust; and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively. It has been seen, that a number of important elections will take place whilst the act is in force; although it should not be continued beyond the term to which it is limited. Should there happen, then, as is extremely probable in relation to some or other of the branches of the government, to be competitions between those who are, and those who are not, members of the government; what will be the situations of the competitors? Not equal; because the characters of the former will be covered by the "Sedition Act" from animadversions exposing them to disrepute among the people; whilst the latter may be exposed to the contempt and hatred of the people, without a violation of the act. What will be the situation of the people? Not free; because they will be compelled to make their election between competitors, whose pretensions they are not permitted by the act, equally to examine, to discuss, and to ascertain. And from both these situations, will not those in power derive an undue advantage for continuing themselves in it; which by impairing the right of election, endangers the blessings of the government founded on it?

It is with justice, therefore, that the General Assembly have affirmed in the resolution, as well that the right of freely examining public characters and measures, and of free communication thereon, is the only effectual guardian of every other right; as that this particular right is levelled at, by the power exercised in the "Sedition Act."

The resolution next in order is as follows:

That this State having by its Convention, which ratified the Federal Constitution, expressly declared, that among other essential rights, "the liberty of conscience and of the press cannot be cancelled, abridged, restrained or modified by any authority of the United States," and from its extreme anxiety to guard these rights from every possible attack of sophistry and ambition, having with other States, recommended an amendment for that purpose, which amendment was, in due time, annexed to the Constitution; it would mark a reproachful inconsistency, and criminal degeneracy, if an indifference were now shewn, to the most palpable violation of one of the rights, thus declared and secured; and to the establishment of a precedent, which may be fatal to the other.

To place this resolution in its just light, it will be necessary to recur to the act of ratification by Virginia, which stands in the ensuing form:

We, the delegates of the people of Virginia, duly elected in pursuance of a recommendation from the General Assembly, and now met in Convention, having fully and freely investigated and discussed the proceedings of the Federal Convention, and being prepared as well as the most mature deliberation hath enabled us, to decide thereon; DO, in the name and in behalf of the people of Virginia, declare and make known, that the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them, whensoever the same shall be perverted to their injury or oppression; and that every power not granted thereby, remains with them, and at their will. That therefore, no right of any denomination can be cancelled, abridged, restrained or modified, by the Congress, by the Senate or House of Representatives acting in any capacity, by the President, or any department or officer of the United States, except in those instances in which power is given by the Constitution for those purposes; and, that among other essential rights, the liberty of conscience and of the press, cannot be cancelled, abridged, restrained or modified by any authority of the United States.

Here is an express and solemn declaration by the Convention of the State, that they ratified the Constitution in the sense, that no right of any denomination can be cancelled, abridged, restrained or modified by the government of the United States or any part of it; except in those instances in which power is given by the Constitution; and in the sense particularly, "that among other essential rights, the liberty of conscience and free-

dom of the press cannot be cancelled, abridged, restrained or modified, by any authority of the United States."

Words could not well express, in a fuller or more forcible manner, the understanding of the Convention, that the liberty of conscience and the freedom of the press, were *equally* and *completely* exempted from all authority whatever of the United States.

Under an anxiety to guard more effectually these rights against every possible danger, the Convention, after ratifying the Constitution, proceeded to prefix to certain amendments proposed by them, a declaration of rights, in which are two articles providing, the one for the liberty of conscience, the other for the freedom of speech and of the press.

Similar recommendations having proceeded from a number of other States; and Congress, as has been seen, having in consequence thereof, and with a view to extend the ground of public confidence, proposed, among other declaratory and restrictive clauses, a clause expressly securing the liberty of conscience and of the press; and Virginia having concurred in the ratifications which made them a part of the Constitution; it will remain with a candid public to decide, whether it would not mark an inconsistency and degeneracy, if an indifference were now shewn to a palpable violation of one of those rights, the freedom of the press; and to a precedent therein, which may be fatal to the other, the free exercise of religion.

That the precedent established by the violation of the former of these rights, may, as is affirmed by the resolution, be fatal to the latter, appears to be demonstrable, by a comparison of the grounds on which they respectively rest; and from the scope of reasoning, by which the power over the former has been vindicated.

First. Both of these rights, the liberty of conscience and of the press, rest equally on the original ground of not being delegated by the Constitution, and consequently withheld from the government. Any construction, therefore, that would attack this original security for the one, must have the like effect on the other.

Secondly. They are both equally secured by the supplement to the Constitution; being both included in the same amendment, made at the same time, and by the same authority. Any construction or argument, then, which would turn the amendment into a grant or acknowledgment of power with respect to the press, might be equally applied to the freedom of religion.

Thirdly. If it be admitted that the extent of the freedom of the press, secured by the amendment, is to be measured by the

common law on this subject, the same authority may be resorted to, for the standard which is to fix the extent of the "free exercise of religion." It cannot be necessary to say what this standard would be; whether the common law be taken solely as the unwritten, or as varied by the written law of England.

Fourthly. If the words and phrases in the amendment, are to be considered as chosen with a studied discrimination, which yields an argument for a power over the press, under the limitation that its freedom be not abridged; the same argument results from the same consideration, for a power over the exercise of religion, under the limitation that its freedom be not prohibited.

For, if Congress may regulate the freedom of the press provided they do not abridge it, because it is said only, "they shall not abridge it," and is not said, "they shall make no law respecting it:" the analogy of reasoning is conclusive, that Congress may *regulate* and even *abridge* the free exercise of religion; provided they do not *prohibit* it; because it is said only "they shall not prohibit it;" and is *not* said, "they shall make no law *respecting*, or no law *abridging* it."

The General Assembly were governed by the clearest reason, then, in considering the "Sedition Act," which legislates on the freedom of the press, as establishing a precedent that may be fatal to the liberty of conscience; and it will be the duty of all, in proportion as they value the security of the latter, to take the alarm at every encroachment on the former.

The two concluding resolutions only remain to be examined. They are in the words following:

That the good people of this Commonwealth, having ever felt and continuing to feel the most sincere affection for their brethren of the other States; the truest anxiety for establishing and perpetuating the Union of all; and the most scrupulous fidelity to that Constitution, which is the pledge of mutual friendship, and the instrument of mutual happiness; the General Assembly doth solemnly appeal to the like dispositions in the other States, in confidence that they will concur with this Commonwealth in declaring, as it does hereby declare, that the acts aforesaid are unconstitutional; and, that the necessary and proper measures will be taken by each, for co-operating with this State, in maintaining unimpaired, the authorities, rights, and liberties reserved in the States respectively, or to the people.

That the Governor be desired, to transmit a copy of the foregoing resolutions to the Executive authority of each of

the other States, with a request that the same may be communicated to the Legislature thereof; and that a copy be furnished to each of the Senators and Representatives, representing this State in the Congress of the United States.

The fairness and regularity of the course of proceeding, here pursued, have not protected it against objections even from sources too respectable to be disregarded.

It has been said, that it belongs to the judiciary of the United States, and not the State Legislatures, to declare the meaning of the Federal Constitution.

But a declaration, that proceedings of the Federal Government are not warranted by the Constitution, is a novelty neither among the citizens, nor among the Legislatures of the States; nor are the citizens or the Legislature of Virginia, singular in the example of it.

Nor can the declarations of either, whether affirming or denying the Constitutionality of measures of the Federal Government; or whether made before or after judicial decisions thereon, be deemed in any point of view, an assumption of the office of the judge. The declarations, in such cases, are expressions of opinion, unaccompanied with any other effect than what they may produce on opinion, by exciting reflection. The expositions of the judiciary, on the other hand, are carried into immediate effect by force. The former may lead to a change in the legislative expression of the general will; possibly to a change in the opinion of the judiciary; the latter enforces the general will, whilst that will and that opinion continue unchanged.

And if there be no impropriety in declaring the unconstitutionality of proceedings in the Federal Government, where can be the impropriety of communicating the declaration to other States, and inviting their concurrence in a like declaration? What is allowable for one must be allowable for all; and a free communication among the States, where the Constitution imposes no restraint, is as allowable among the State Governments as among other public bodies or private citizens. This consideration derives a weight, that cannot be denied to it, from the relation of the State Legislatures to the Federal Legislature, as the immediate constituents of one of its branches.

The Legislatures of the States have a right also to originate amendments to the Constitution, by a concurrence of two thirds of the whole number, in applications to Congress for the purpose. When new States are to be formed by a junction of two or more States or parts of States, the Legislatures of the States concerned are, as well as Congress, to concur in the

measure. The States have a right also to enter into agreements or compacts, with the consent of Congress. In all such cases a communication among them results from the object which is common to them.

It is lastly to be seen, whether the confidence expressed by the resolution, that the *necessary and proper measures* would be taken by the other States for co-operating with Virginia in maintaining the rights reserved to the States, or to the people, be in any degree liable to the objections which have been raised against it.

If it be liable to objection, it must be because either the object or the means are objectionable.

The object being to maintain what the Constitution has ordained, is in itself a laudable object.

The means are expressed in the terms "the necessary and proper measures." A proper object was to be pursued, by means both necessary and proper.

To find an objection, then, it must be shown that some meaning was annexed to these general terms, which was not proper; and, for this purpose, either that the means used by the General Assembly were an example of improper means, or that there were no proper means to which the terms could refer.

In the example given by the State, of declaring the Alien and Sedition Acts to be unconstitutional, and of communicating the declaration to the other States, no trace of improper means has appeared. And if the other States had concurred in making a like declaration, supported too by the numerous applications flowing immediately from the people, it can scarcely be doubted, that these simple means would have been as sufficient, as they are unexceptionable.

It is no less certain that other means might have been employed, which are strictly within the limits of the Constitution. The Legislatures of the States might have made a direct representation to Congress, with a view to obtain a rescinding of the two offensive acts; or, they might have represented to their respective Senators in Congress, their wish, that two thirds thereof would propose an explanatory amendment to the Constitution; or two thirds of themselves, if such had been their option, might, by an application to Congress, have obtained a Convention for the same object.

These several means, though not equally eligible in themselves, nor probably, to the States, were all constitutionally open for consideration. And if the General Assembly, after declaring the two acts to be unconstitutional, the first and most obvious proceeding on the subject, did not undertake to point out to the other States, a choice among the farther measures

that might become necessary and proper, the reserve will not be misconstrued by liberal minds into any culpable imputation.

These observations appear to form a satisfactory reply to every objection which is not founded on a misconception of the terms employed in the resolutions. There is one other, however, which may be of too much importance not to be added. It cannot be forgotten, that among the arguments addressed to those who apprehended danger to liberty from the establishment of the General Government over so great a country, the appeal was emphatically made to the intermediate existence of the State Governments, between the people and that Government, to the vigilance with which they would descry the first symptoms of usurpation, and to the promptitude with which they would sound the alarm to the public. This argument was probably not without its effect; and if it was a proper one then, to recommend the establishment of the Constitution, it must be a proper one now, to assist in its interpretation.

The only part of the two concluding resolutions that remains to be noticed, is the repetition in the first, of that warm affection to the Union and its members, and of that scrupulous fidelity to the Constitution, which have been invariably felt by the people of this State. As the proceedings were introduced with these sentiments, they could not be more properly closed than in the same manner. Should there be any so far misled as to call in question the sincerity of these professions, whatever regret may be excited by the error, the General Assembly cannot descend into a discussion of it. Those, who have listened to the suggestion, can only be left to their own recollection of the part which this State has borne in the establishment of our National Independence, in the establishment of our National Constitution, and in maintaining under it the authority and laws of the Union, without a single exception of internal resistance or commotion. By recurring to these facts, they will be able to convince themselves, that the representatives of the people of Virginia, must be above the necessity of opposing any other shield to attacks on their national patriotism, than their own consciousness, and the justice of an enlightened public; who will perceive in the resolutions themselves, the strongest evidence of attachment both to the Constitution and to the Union, since it is only by maintaining the different governments and departments within their respective limits, that the blessings of either can be perpetuated.

The extensive view of the subject thus taken by the committee, has led them to report to the House, as the result of the whole, the following resolution:

Resolved, That the General Assembly, having carefully and respectfully attended to the proceedings of a number of the States, in answer to their resolutions of December 21, 1798, and having accurately and fully re-examined and re-considered the latter, find it to be their indispensable duty to adhere to the same, as founded in truth, as consonant with the Constitution, and as conducive to its preservation; and more especially to be their duty to renew, as they do hereby renew, their protest against "the Alien and Sedition Acts," as palpable and alarming infractions of the Constitution.

KENTUCKY LEGISLATURE.

IN THE HOUSE OF REPRESENTATIVES,

November 10, 1798.

The House, according to the standing order of the day, resolved itself into a Committee of the whole, on the state of the Commonwealth,

Mr. CALDWELL in the chair,

And after some time spent therein, the Speaker resumed the chair, and Mr. Caldwell reported, that the Committee had, according to order, had under consideration the Governor's address, and had come to the following resolutions thereupon, which he delivered in at the Clerk's table, where they were twice read and agreed to by the House.

1. *Resolved,* That the several States composing the United States of America, are not united on the principle of unlimited submission to their General Government; but that by compact under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a General Government for special purposes, delegated to that Government certain definite powers, reserving each State to itself, the residuary mass of right to their own self-Government; and that whensoever the General Government assumes undelegated powers, its acts are unauthoritative, void, and of no force: That to this compact each State acceded as a State, and

is an integral party, its Co-States forming as to itself, the other party: That the Government created by this compact was not made the exclusive or final *judge* of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions, as of the mode and measure of redress.

2. *Resolved*, That the Constitution of the United States having delegated to Congress a power to punish treason, counterfeiting the securities and current coin of the United States, piracies and felonies committed on the high seas, and offences against the laws of nations, and no other crimes whatever, and it being true as a general principle, and one of the amendments to the Constitution having also declared, "that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people;" therefore also the same act of Congress, passed on the 14th day of July, 1798, and entitled "an act, in addition to the act entitled an act, for the punishment of certain crimes against the United States;" as also the act passed by them on the 27th day of June, 1798, entitled "an act, to punish frauds committed on the Bank of the United States," (and all other their acts which assume to create, define, or punish crimes other than those enumerated in the Constitution,) are altogether void and of no force, and that the power to create, define, and punish such other crimes is reserved, and of right, appertains solely and exclusively to the respective States, each within its own territory.

3. *Resolved*, That it is true as a general principle, and is also expressly declared by one of the amendments to the Constitution, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people;" and that no power over the freedom of religion, freedom of speech, or freedom of the press, being delegated to the United States by the Constitution, nor prohibited by it to the States, all lawful powers respecting the same did of right remain, and were reserved to the States, or to the people: That thus was manifested their determination to retain to themselves, the right of judging how far the licentiousness of speech and of the press, may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use, should be tolerated rather than the use be destroyed; and thus also, they guarded against all abridgment by the United States

of the freedom of religious opinions and exercises, and retained to themselves the right of protecting the same, as this State by a law passed on the general demand of its citizens, had already protected them from all human restraint or interference: And that in addition to this general principle and express declaration, another and more special provision has been made by one of the amendments to the Constitution, which expressly declares, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press," thereby guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press, insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehoods, and defamation, equally with heresy and false religion, are withheld from the cognizance of Federal tribunals: That therefore the act of the Congress of the United States, passed on the 14th day of July, 1798, entitled "an act, in addition to the act, for the punishment of certain crimes against the United States," which [illegible]es abridge the freedom of the press, is not law, but is altoge[illegible]er void and of no effect.

4. *Resolved*, That alien friends are under the jurisdiction and protection of the laws of the State wherein they are; that no power over them has been delegated to the United States, nor prohibited to the individual States distinct from their power over citizens; and it being true as a general principle, and one of the amendments to the Constitution having also declared, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people," the act of the Congress of the United States, passed on the 22d day of June, 1798, entitled "an act concerning aliens," which assumes power over alien friends not delegated by the Constitution, is not law, but is altogether void and of no force.

5. *Resolved*, That in addition to the general principle as well as the express declaration, that powers not delegated are reserved, another and more special provision inserted in the Constitution from abundant caution has declared, "that the *migration* or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808:" That this Commonwealth does admit the migration of alien friends described as the subject of the said act concerning aliens; that a provision against prohibiting their migration, is a provision against all acts equivalent thereto, or it would be nugatory; that to remove them when migrated, is equivalent to a prohi-

bition of their migration, and is therefore contrary to the said provision of the Constitution, and void.

6. *Resolved*, That the imprisonment of a person under the protection of the laws of this Commonwealth on his failure to obey the simple *order* of the President, to depart out of the United States, as is undertaken by the said act, entitled "an act concerning aliens," is contrary to the Constitution, one amendment to which has provided, that "no person shall be deprived of liberty without due process of law," and that another having provided, "that in all criminal prosecutions, the accused shall enjoy the right to a public trial by an impartial jury, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence," the same act undertaking to authorise the President to remove a person out of the United States who is under the protection of the law, on his own suspicion, without accusation, without jury, without public trial, without confrontation of the witnesses against him, without having witnesses in his favour, without defence, without counsel, is contrary to these provisions also of the Constitution, is therefore not law, but utterly void and of no force.

That transferring the power of judging any person who is under the protection of the laws, from the Courts to the President of the United States, as is undertaken by the same act, concerning aliens, is against the article of the Constitution, which provides, that "the judicial power of the United States, shall be vested in Courts, the Judges of which shall hold their offices during good behaviour," and that the said act is void for that reason also; and it is further to be noted, that this transfer of Judiciary power is to that magistrate of the General Government who already possesses all the Executive, and a qualified negative in all the Legislative powers.

7. *Resolved*, That the construction applied by the General Government, (as is evinced by sundry of their proceedings,) to those parts of the Constitution of the United States which delegates to Congress a power to lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defence and general welfare of the United States, and to make all laws which shall be necessary and proper for carrying into execution the powers vested by the Constitution in the Government of the United States, or any department thereof, goes to the destruction of all the limits prescribed to their power by the Constitution—That words meant by that instrument to be subsidiary only to the execution of the lim-

ited powers, ought not to be so construed as themselves to give unlimited powers, nor a part so to be taken, as to destroy the whole residue of the instrument: That the proceedings of the General Government under colour of these articles, will be a fit and necessary subject for revisal and correction at a time of greater tranquillity, while those specified in the preceding resolutions call for immediate redress.

8. *Resolved*, That the preceding resolutions be transmitted to the Senators and Representatives in Congress from this Commonwealth, who are hereby enjoined to present the same to their respective Houses, and to use their best endeavours to procure at the next session of Congress, a repeal of the aforesaid unconstitutional and obnoxious acts.

9. *Resolved, lastly*, That the Governor of this Commonwealth be, and is hereby authorised and requested to communicate the preceding resolutions to the Legislatures of the several States, to assure them that this Commonwealth considers Union for specified National purposes, and particularly for those specified in their late Federal Compact, to be friendly to the peace, happiness and prosperity of all the States: that faithful to that Compact according to the plain intent and meaning in which it was understood and acceded to by the several parties, it is sincerely anxious for its preservation: that it does also believe, that to take from the States all the powers of self-Government, and transfer them to a general and consolidated Government, without regard to the special delegations and reservations solemnly agreed to in that Compact, is not for the peace, happiness, or prosperity of these States: And that therefore, this Commonwealth is determined, as it doubts not its Co-States are, tamely to submit to undelegated and consequently unlimited powers in no man or body of men on earth: that if the acts before specified should stand, these conclusions would flow from them; that the General Government may place any act they think proper on the list of crimes, and punish it themselves, whether enumerated or not enumerated by the Constitution as cognizable by them; that they may transfer its cognizance to the President or any other person, who may himself be the accuser, counsel, judge and jury, whose *suspicions* may be the evidence, his order the sentence, his officer, the executioner, and his breast the sole record of the transaction; that a very numerous and valuable description of the inhabitants of these States, being by this precedent reduced as outlaws to the absolute dominion of one man and the barrier of the Constitution thus swept away from us all, no rampart now remains against the passions and the power of a majority of Congress, to protect from a like exportation or other more grievous pun-

ishment the minority of the same body, the Legislatures, Judges, Governors and Counsellors of the States, nor their other peaceable inhabitants who may venture to re-claim the Constitutional rights and liberties of the States and people, or who for other causes, good or bad, may be obnoxious to the views, or marked by the suspicions of the President, or be thought dangerous to his or their elections or other interests public or personal: that the friendless alien has indeed been selected as the safest subject of a first experiment; but the citizen will soon follow, or rather has already followed; for, already has a Sedition Act marked him as its prey: that these and successive acts of the same character, unless arrested on the threshold, may tend to drive these States into revolution and blood, and will furnish new calumnies against Republican Governments, and new pretexts for those who wish it to be believed, that man cannot be governed but by a rod of iron: that it would be a dangerous delusion, were a confidence in the men of our choice, to silence our fears for the safety of our rights: that confidence is every where the parent of despotism: free government is founded in jealousy and not in confidence; it is jealousy and not confidence which prescribes limited Constitutions to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which and no further our confidence may go; and let the honest advocate of confidence read the Alien and Sedition Acts, and say if the Constitution has not been wise in fixing limits to the Government it created, and whether we should be wise in destroying those limits? Let him say what the Government is if it be not a tyranny, which the men of our choice have conferred on the President, and the President of our choice has assented to and accepted over the friendly strangers, to whom the mild spirit of our country and its laws had pledged hospitality and protection: that the men of our choice have more respected the bare suspicions of the President, than the solid rights of innocence, the claims of justification, the sacred force of truth, and the forms and substance of law and justice. In questions of power, then let no more be heard of confidence in man, but bind him down from mischief, by the chains of the Constitution. That this Commonwealth does therefore call on its Co-States for an expression of their sentiments on the acts concerning aliens, and for the punishment of certain crimes herein-before specified, plainly declaring whether these acts are or are not authorised by the Federal Compact? And it doubts not that their sense will be so announced, as to prove their attachment unaltered to limited government, whether general or particular, and that the rights and

liberties of their Co-States, will be exposed to no dangers by remaining embarked on a common bottom with their own: That they will concur with this Commonwealth in considering the said acts as so palpably against the Constitution, as to amount to an undisguised declaration, that the Compact is not meant to be the measure of the powers of the General Government, but that it will proceed in the exercise over these States of all powers whatsoever: That they will view this as seizing the rights of the States, and consolidating them in the hands of the General Government with a power assumed to bind the States, (not merely in cases made Federal,) but in all cases whatsoever, by laws made, not with their consent, but by others against their consent: That this would be to surrender the form of Government we have chosen, and to live under one deriving its powers from its own will, and not from our authority; and that the Co-States recurring to their natural right in cases not made Federal, will concur in declaring these acts void and of no force, and will each unite with this Commonwealth in requesting their repeal at the next session of Congress.

EDMUND BULLOCK, *S. H. R.*
JOHN CAMPBELL, *S. S. P. T.*

Passed the House of Representatives, Nov. 10th, 1798.

Attest,

THOMAS TODD, *C. H. R.*

IN SENATE, November 13th, 1798, unanimously concurred in.

Attest,

B. THRUSTON, *Clk. Sen.*

Approved November 16th, 1798.

JAMES GARRARD, *G. K.*

By the Governor.

HARRY TOULMIN,
Secretary of State.